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In the matter of:

Digital Performance Right in
Sound Recording and Ephemeral
Recording

Docket No.
2000-9

CARP DTRA
1 & 2

CARP Hearing Room
LM-414
Library of Congress
Madison Building
101 Independence Ave, SE
Washington, D.C.

Wednesday,
October 17, 2001

The above-entitled matter came on for rebuttal
hearing, pursuant to notice, at 9:00 a.m.

BEFORE

THE HONORABLE ERIC E. VAN LOON	Chairman
THE HONORABLE JEFFREY S. GULIN	Arbitrator
THE HONORABLE CURTIS E. von KANN	Arbitrator

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WASHINGTON, D.C. 20005-3701

ORIGINAL

APPEARANCES:On Behalf of Clear Channel Communications, Inc.,
National Religious Broadcasters Music License
Committee, and Salem Communications Corporation

KARYN ABLIN, ESQ.
BRUCE G. JOSEPH, ESQ.
THOMAS W. KIRBY, ESQ.
DINEEN PASHOUKOS WASYLIK, ESQ.

of: Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-4913
(202) 719-7000

On Behalf of American Federation of Television
and Radio Artists

ARTHUR J. LEVINE, ESQ.
of: Finnegan, Henderson, Farabow,
Garrett & Dunner, LLP
1300 I Street, N.W.
Washington, D.C. 20005-3315
(202) 408-4032

On Behalf of the Association for Independent
Music

JACQUES M. RIMOKH, ESQ.
BARRY I. SLOTNIK, ESQ.
of: Loeb & Loeb, LLP
345 Park Avenue
New York, New York 10154-0037
(212) 407-4900

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WASHINGTON, D.C. 20005-3701

APPEARANCES: (Cont'd)

On Behalf of BET.com; CBS Broadcasting, Inc.; Comedy Central; Coolink Broadcast Network; Echo Networks, Inc.; Everstream, Inc.; Incanta, Inc.; Launch Media, Inc.; Listen.com; Live365.com; MTVi Group, LLC; MusicMatch, Inc.; MyPlay, Inc.; NetRadio Corporation; Radioactive Media Partners, Inc.; RadioWave.com, Inc.; Entercom Communications Corporation; Spinner Networks, Inc.; Susquehanna Radio Corp.; Univision Online; Westwind Media.com, Inc.; and Xact Radio Network, LLC

ADAM I. COHEN, ESQ.

MARK A. JACOBY, ESQ.

R. BRUCE RICH, ESQ.

FIONA SCHAEFFER, ESQ.

KENNETH L. STEINTHAL, ESQ.

of: Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8622

On Behalf of AEI Music Network; DMX Music, Inc.

SANDRA M. AISTARS, ESQ.

DAVID R. BERZ, ESQ.

of: Weil, Gotshal & Manges, LLP
1615 L Street, N.W., Suite 700
Washington, D.C. 20036
(202) 682-7272

On Behalf of the Recording Industry Association of America, Inc.

JOHN A. FREEDMAN, ESQ.

ROBERT ALAN GARRETT, ESQ.

HADRIAN R. KATZ, ESQ.

BRAD R. NEWBERG, ESQ.

RONALD A. SCHECHTER, ESQ.

JULE L. SIGALL, ESQ.

CHRISTOPHER WINTERS, ESQ.

MICHELE J. WOODS, ESQ.

of: Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5719

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WASHINGTON, D.C. 20005-3701

APPEARANCES: (Cont'd)

On Behalf of Public Radio:

DENISE LEARY, ESQ.
 of: Public Radio, Inc.
 635 Massachusetts Avenue, N.W.
 Washington, D.C. 20001
 (202) 513-2049

On Behalf of American Federation of Musicians of
 the United States and Canada:

PATRICIA POLACH, ESQ.
 of: Bredhoff & Kaiser, P.L.L.C.
 805 15th Street, N.W.
 Suite 1000
 Washington, D.C. 20005
 (202) 842-2600

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C-O-N-T-E-N-T-S

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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Michael Fine

By Mr. Jacoby	11458			
By Mr. Newberg		11498		

William Fisher

By Mr. Rich	11598		11715	
By Mr. Garrett		11638		

<u>EXHIBIT</u>	<u>DESCRIPTION</u>	<u>MARK</u>	<u>RECD</u>
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Fine Rebuttal

3A, 3B, 4A, 4B		11456	11498
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RIAA

107 RPX	Garth Brooks Chart	11524	
108 RPX	Garth Brooks Chart	11524	
109 RPX	20th Century Masters	11531	
110 RPX	"These are Special Times"	11546	
111 RPX	"Starting Over"	11562	
112 RPX	"Recently"	11568	
113 RPX	Australian Decision	11687	11718

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P-R-O-C-E-E-D-I-N'-G-S

(9:11 a.m.)

CHAIRMAN VAN LOON: Well, good morning everyone. And, again, the Panel apologizes. We appreciate your being here on time and do our best. The Capitol Police interceded this morning, and we're going to try to be on better relations with the law enforcement officials in the future and be able to be here on time.

MR. JACOBY: Is there anything you want to share with us on why that happened?

(Laughter.)

CHAIRMAN VAN LOON: No, not necessary.

MR. JACOBY: Okay.

CHAIRMAN VAN LOON: Any administrative or procedural things before we hear from our first witness? Mr. Garrett?

MR. GARRETT: Just a question, Mr. Chairman. Yesterday during his testimony Mr. Mandelbrot made a number of statements about the reasons why RIAA entered into the agreement with Yahoo as well as RIAA -- his reasons for believing that RIAA

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1 had certain motivations for particular provisions in
2 the agreements.

3 And my question simply is whether our
4 witnesses will have an opportunity or whether they
5 will be permitted to respond to some of the things
6 that Mr. Mandelbrot said.

7 CHAIRMAN VAN LOON: I suppose there's two
8 ways at looking at it. One is that we, the Panel,
9 specifically invited these people -- the licensees --
10 to get an idea of what was in their thoughts and their
11 minds having heard extensively from Mr. Marks for over
12 a week about what was in his mind.

13 And I suppose one way of looking at it is
14 that this is an interesting picture and we -- you
15 know, he may or may not have been right in his
16 surmises of what he thought the negotiators on the
17 other side of the table were thinking. And I suppose
18 the other way of looking at it is to provide an
19 opportunity for specific rebuttal of that.

20 Does the Panel have --

21 ARBITRATOR GULIN: Yes. I guess I'd want
22 to ask the webcasters this: Mr. Mandelbrot was only

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1 the second of the licensees to testify. There are
2 going to be others, and some of those are going to say
3 some things that you'd like to rebut. So have there
4 been discussions between the two sides on this issue,
5 whether you want to allow your witnesses to be able to
6 comment on things that have been said by licensee
7 witnesses?

8 MR. GARRETT: There have not been any
9 discussions, Judge Gulin.

10 ARBITRATOR GULIN: Why don't we hear from
11 the webcasters' side?

12 MR. STEINTHAL: I think I alluded to this
13 last week, that -- when we were talking about Mr.
14 Marks' testimony and the duration of it. And that I
15 had a feeling we were going to get to an issue about,
16 you know, the duration, for example, of Mr. Marks'
17 testimony, and that if we were going to start
18 rebutting all of the licensee testimony then it could
19 be a lot longer than anticipated.

20 Personally, I would rather not let, you
21 know, the genie out of the bottle, in the sense that
22 once we get into that area it could lead to extensive

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1 examination. I wouldn't characterize Mr. Mandelbrot's
2 testimony as his testifying about the RIAA's
3 motivations as opposed to what was articulated to him
4 during the course of the negotiations about the RIAA's
5 motivations.

6 In other words, he wasn't speculating as
7 much as he was testifying based on meetings he was at
8 and information he gleaned from those meetings.

9 ARBITRATOR GULIN: Either way we'd like
10 to --

11 MR. STEINTHAL: Right.

12 ARBITRATOR GULIN: -- whatever he said.

13 MR. STEINTHAL: I would prefer that we not
14 get into an area where we start rebutting all of the
15 licensees through witnesses that have previously
16 testified. Among other things, we have a situation
17 where Mr. Marks is on their witness list. And,
18 therefore, he's -- they have the advantage, if you
19 open the door, to having a witness that's already on
20 the list rebut.

21 Now, what if something comes up, entirely
22 likely or possible, where I don't have somebody to

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1 rebut without adding somebody to the witness list.
2 Then, I'm prejudiced. So it's not as simple as once
3 you say, "Okay. Let the RIAA rebut. Let the
4 webcasters rebut." If I don't have somebody on the
5 witness list to do it, I can't do it.

6 MR. JACOBY: Can I make a suggestion along
7 this line of a way to approach this? It would seem to
8 me --

9 CHAIRMAN VAN LOON: Suggestions are always
10 welcome.

11 MR. JACOBY: It would seem to me on -- I
12 can't think of a matter that Mr. Mandelbrot didn't
13 testify -- that he testified about that wasn't the
14 subject of testimony from Mr. Marks' perspective. He
15 was on the direct case. He testified about each of
16 the negotiations.

17 And unless there is something that's
18 raised that couldn't be anticipated, wasn't
19 anticipated, or is outside of the scope of his prior
20 testimony, then it seems to me the rule should be that
21 there should not be opening the door.

22 It should only be a situation where

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1 there's some -- something new that's come up that
2 could not have fairly been anticipated or was not
3 covered in their testimony earlier, where an
4 application would be made to the Panel and the Panel
5 could decide that on a case-by-case basis.

6 CHAIRMAN VAN LOON: Mr. Garrett, do you
7 have any further thoughts on that?

8 MR. GARRETT: Yes, a couple. First of
9 all, as to Mr. Steinthal's being prejudiced by not
10 having a witness, since all of this testimony concerns
11 negotiations between RIAA and the licensees, it's not
12 clear to me what witness Mr. Steinthal would have in
13 any event. However, I'm certainly prepared to do
14 that, you know, to consider letting him bring somebody
15 in on a, you know, case-by-case basis, if there really
16 is someone that he has that would be responsive.

17 Beyond that, you know, I think from the
18 beginning of this proceeding the Panel has made clear
19 that they had a strong interest in hearing the
20 testimony about the Yahoo agreement. The other side
21 has certainly made a significant issue about Yahoo in
22 our dealings with Yahoo.

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1 And I think given the importance that has
2 been attached or seemingly attached by the Panel and
3 by the other parties to this proceeding to Yahoo's
4 testimony, in all fairness, we should have the
5 opportunity to respond to things that we think that
6 the Panel might conceivably otherwise rely upon in
7 their decision here.

8 I'm not envisioning very lengthy
9 testimony, and I'm not sure I would confine it just to
10 Mr. Marks either. But the point is is that it is
11 important testimony. Yahoo is our licensee. They
12 also are not a disinterested party in the sense that
13 the outcome of this proceeding will have an impact on
14 them. They're here. They were here yesterday
15 represented by DiMA's counsel.

16 I think that it's important for us to have
17 the opportunity to respond to at least those things
18 that were said by Mr. Mandelbrot concerning RIAA's
19 motivations.

20 ARBITRATOR VON KANN: Mr. Garrett, just a
21 couple of thoughts from one Panelist. We are reaching
22 the point in a trial-like proceeding where everybody

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1 is nervous about who is going to have the last word.
2 This always happens in long trials. Everybody always
3 likes to do it. I'm sure they'll have some issues of
4 that sort, you'll have some issues, and at some point
5 the curtain does have to come down.

6 Number two, I did not, frankly, think
7 there was anything in Mr. Mandelbrot's testimony which
8 was startlingly at odds with Mr. Marks' testimony,
9 other than the perceptions of two people on opposite
10 sides of the negotiating table. I mean, it's quite
11 common, frankly, for people to get somewhat different
12 perceptions about what the other side's motivations
13 are.

14 So from my point of view, there was -- I
15 haven't gone back to study it in great detail, but
16 there was nothing about that that I found dramatically
17 at odds with Mr. Marks' account of it. It is an
18 important licensee. I think we all recognize.

19 Perhaps we could have a special Yahoo rule
20 that if there was something very, very striking in
21 that one licensee that you felt it was critical to
22 rebut, you could make a proffer to us or something,

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1 and we could consider it.

2 But I would be a little nervous about
3 opening this up with all of the licensees that we're
4 going to have. And, frankly, I also think it's --
5 from your point of view, I think you may be
6 overnervous about it. I don't think that there was,
7 from my point of view, anything about his account that
8 in any significant way requires massive rebuttal from
9 Marks, other than his perception of it from one side
10 of the table and Marks' from another.

11 Frankly, I think their testimony can be
12 harmonized fairly well, actually. But if there's
13 something specific, I guess if you wanted to make a
14 proffer to us, perhaps we could consider it under the
15 special Yahoo rule. But I would certainly not want to
16 start seeing us do this with every single licensee,
17 because we'll -- we will, then, be prolonging this
18 rebuttal forever.

19 But maybe there is something very specific
20 in that that you feel is critical to -- and I guess we
21 could consider it on a case-by-case basis or
22 something.

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1 MR. STEINTHAL: I just had a -- just a
2 couple of thoughts. One is Mr. Garrett referred to us
3 making a big deal about Yahoo, about, you know, from
4 the beginning as if they're not a disinterested
5 interest witness and they're "on our side" almost.

6 I want to remind the Panel that when I got
7 up in my opening we had not even been given the right
8 to talk to Yahoo. We had no idea what Yahoo had to
9 say or what its motivations, positions were at all.
10 There had been effectively a gag order on Yahoo.

11 So the notion that there is some
12 relationship between the webcaster community and
13 Yahoo, relative to Yahoo's testimony, in a
14 circumstance where we had no opportunity to even speak
15 to them by the time this proceeding started, is a
16 startling suggestion.

17 And as far as Mr. Greenstein being DiMA's
18 counsel, he has acted on behalf of DiMA very
19 independently of his relationships with many other
20 clients, both on the record community side and the
21 webcaster side. So the notion that because Mr.
22 Greenstein, among his clients, has done legislative

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1 work for DiMA, there is some, you know, suggestion of
2 affiliation there is, again, something that isn't even
3 part of the record.

4 But since Mr. Garrett decided to mention
5 it, I think it's important to say that Mr. Greenstein
6 and his firm represent record companies. They
7 represent DiMA. And they represent Yahoo. So there
8 should be no suggestion associated with that.

9 I am concerned about the time associated
10 with opening the door to have Mr. Marks respond to all
11 of the licensees. And, you know, I guess the Panel
12 will reach a resolution of this issue as it chooses,
13 but I hope we will not be prejudiced by the fact that
14 they've got an opportunity for a ready witness while
15 we don't.

16 CHAIRMAN VAN LOON: I think we will --
17 what I would propose is that we take this under
18 advisement, that we talk about it during the break and
19 get back with our thoughts thereafter.

20 ARBITRATOR GULIN: Let me ask this one
21 question. The parties were permitted, under the
22 procedure we agreed to, to designate I think it was

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1 six witnesses each that would be able to comment on I
2 guess it was opposing witnesses' testimony on
3 rebuttal. And there was really, as I recall, not any
4 discussion as to whether that would include the
5 licensee witnesses.

6 Was Mr. Marks designated as one who would
7 be commenting on opposing witnesses?

8 MR. GARRETT: Yes. Yes, Your Honor.

9 ARBITRATOR GULIN: And, of course, you had
10 to indicate on what he would be commenting on. But I
11 guess it's conceivable that you could have indicated
12 that he would be commenting on the licensees'
13 perceptions of negotiations, though we really didn't
14 discuss that you'd have the ability to do that.

15 But it's just another -- I guess something
16 else to consider when -- that goes into the mix of
17 this. Did you have something else you wanted to --

18 MR. GARRETT: Well, just -- I mean,
19 obviously, Your Honor, we didn't know what the
20 witnesses were going to say.

21 ARBITRATOR GULIN: Right.

22 MR. GARRETT: And couldn't say we're going

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1 to comment on any of them --

2 ARBITRATOR GULIN: Right.

3 MR. GARRETT: -- at that point. I have no
4 problem in confining this at least to Yahoo. Maybe
5 that's just because there has only been two who have
6 testified, but -- or confine it to Yahoo.

7 There's also one other issue here, too,
8 which is is that Mr. Greenstein had suggested
9 yesterday that -- well, he had asked that the
10 testimony, a large portion of it, be heard in closed
11 session. And, you know, many of the things that were
12 said about RIAA's motivations, the things that were
13 said in closed session, and so technically they are
14 things that we can't share with the client at this
15 point and even get their reaction to some of the
16 things that were said.

17 And I'd certainly like the ability to
18 provide to the client those portions of the
19 transcript, including the closed sessions, where there
20 was testimony about matters that -- don't want to give
21 them the testimony about Yahoo's motivations of their
22 negotiating strategy, but only about those things

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1 concerning RIAA's motivations.

2 You know, it's possible, but once they see
3 that, you know, there's nothing that -- you know, very
4 elaborate that anybody would want to present here.
5 But, you know, I think in fairness they should have an
6 opportunity to look at that testimony, and I think we
7 should have the opportunity to at least request that
8 specific testimony be offered in response if we
9 thought it was necessary.

10 MR. STEINTHAL: I think there's an easy
11 procedure for that, which is that to the extent there
12 are passages of the transcript that relate to Mr.
13 Mandelbrot's testimony about what the RIAA said to
14 him, because we were in a situation where there was --
15 because there was the risk of restricted information,
16 we were probably in a restricted transcript more than
17 we needed to be on an entire -- well, looked at in
18 retrospect, on an entire basis.

19 I'm sure that Mr. Greenstein, if presented
20 with a request to treat as confidential rather than
21 restricted certain passages that relate to Mr.
22 Mandelbrot's testimony about what RIAA said to him,

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1 I'm sure he would have no objection to that being
2 treated as confidential rather than restricted.

3 I think it's just a question of RIAA
4 identifying those passages of the transcript and
5 making a request to Yahoo. I think that those are the
6 ground rules that were agreed upon at the outset of
7 his testimony.

8 CHAIRMAN VAN LOON: Well, I am at least
9 genuinely up in the air on this, and I think that the
10 best thing is for the Panel to discuss it during a
11 break. I think it raises lots of delicate questions,
12 including that the Panel is acutely aware that we
13 invited these people and gave them assurances of
14 confidentiality.

15 We learned yesterday there is very
16 possibly another negotiation upcoming very soon, and
17 sometimes hard information about what the other side
18 thinks you think can be a factor in the negotiation.
19 So it's a very complicated matter.

20 MR. GARRETT: One thing I could offer, Mr.
21 Chairman, is that we're certainly prepared to go
22 through the transcript and make our cuts as to what we

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1 think could be declassified, and then to show it to
2 Mr. Greenstein and see whether we can get agreement on
3 that.

4 And, you know, we're certainly prepared to
5 undertake the work in the first instance here. But,
6 again, we would want to get a response back from him,
7 so that we would have -- we'd be in a position to make
8 a timely request for any kind of response and
9 testimony.

10 CHAIRMAN VAN LOON: Okay. Suggestions are
11 welcome. We'll take that under advisement, then, and
12 we're -- should at this time invite -- oops, there may
13 be --

14 MR. STEINTHAL: One more procedural issue.

15 CHAIRMAN VAN LOON: -- it looks like one
16 more procedural matter.

17 MR. STEINTHAL: Late-breaking scheduling
18 issues. We are going to have to move the testimony of
19 Ms. Morissette for just basically -- have her just,
20 you know, come in on direct as the -- on the written
21 statement as initially discussed, unless we can
22 schedule her for next week.

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1 Mr. Fagin is still on board for Friday.
2 But I did receive word last night that Ms. Morissette
3 will not be able to be here Friday morning, which
4 should make our Friday a little bit easier. That's
5 the good news.

6 And I will get back to the other side and
7 the Panel about availability for next week or whether,
8 in the scheme of things, it's so tight we should just
9 go forward on the direct, you know, written statement.

10 CHAIRMAN VAN LOON: But Mr. Fagin will be
11 able to be here on Friday as planned.

12 MR. STEINTHAL: I'm advised that's still
13 the case.

14 CHAIRMAN VAN LOON: And so that would also
15 suggest more time for Mr. Jaffe, Professor Jaffe, on
16 Friday.

17 MR. STEINTHAL: Right. And --

18 MR. JACOBY: Was the Panel made aware of
19 the fact also that RIAA had offered to move Dr.
20 Seltzer up to --

21 MR. STEINTHAL: Yes, we did that.

22 MR. JACOBY: -- Thursday? Okay. So we're

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1 prepared to go forward with that.

2 CHAIRMAN VAN LOON: So it's definite on
3 Thursday?

4 MR. GARRETT: Yes.

5 MR. JACOBY: Do we have actually the
6 schedule worked out in terms of who is --

7 MR. GARRETT: I think he was in the
8 afternoon.

9 MR. JACOBY: Afternoon?

10 MR. GARRETT: Yes. I think he's the last
11 witness on that day.

12 MR. JACOBY: Okay.

13 ARBITRATOR VON KANN: That leaves four for
14 Thursday if I counted -- Mazis, Williams, Kessler, and
15 Seltzer? And possibly carryover of Fisher, if we
16 don't finish him today. A busy day.

17 MR. JACOBY: Possibly, but hopefully not.
18 And I would anticipate Kessler and Williams to be
19 relatively short.

20 CHAIRMAN VAN LOON: Well, let's leap into
21 the first witness, then.

22 MR. JACOBY: Okay. Mr. Fine.

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1 CHAIRMAN VAN LOON: Yes.

2 MR. JACOBY: For the Panel's benefit in
3 advance of his testimony, Mr. Fine will, of course, be
4 addressing his rebuttal testimony as filed in written
5 form. As indicated in the notices we gave last
6 Friday, he will also be commenting upon portions of
7 Dr. Seltzer's testimony, as well as Dr. Schink's
8 testimony, so you might want to have -- the Panel
9 might want to have the testimony available now.

10 And, lastly, I don't think these have been
11 distributed to the Panel. There were four pages,
12 which we've marked as Fine Rebuttal Exhibits 3A and 3B
13 and 4A and 4B, which were likewise provided to counsel
14 last Friday. We haven't provided one to the Copyright
15 Office. I guess we should for the public file as
16 well. Do you have a copy?

17 (Whereupon, the above-referred
18 to documents were marked as
19 Fine Rebuttal Exhibits Nos. 3A,
20 3B, 4A, and 4B for
21 identification.)

22 CHAIRMAN VAN LOON: Yes. We can make --

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1 these are exhibits?

2 MR. JACOBY: These are exhibits to his
3 testimony, because -- I mean, we'll offer them
4 formally, but that's what they're intended to be --
5 exhibits.

6 CHAIRMAN VAN LOON: They will be offered
7 during the course of the testimony.

8 MR. JACOBY: Yes.

9 CHAIRMAN VAN LOON: Yes, okay.

10 MR. JACOBY: But I just wanted you to have
11 it in advance.

12 CHAIRMAN VAN LOON: By the way, with
13 regard to the scheduling changes, if it were possible
14 to produce just an update of this tomorrow on all of
15 these changes to be a handy reminder to the Panel,
16 that would be appreciated.

17 Well, welcome back, Mr. Fine. Good to see
18 you again. Let me ask you, once again, to raise your
19 right hand, please, and be sworn.

20 WHEREUPON,

21 MICHAEL FINE

22 was called as a witness and, having been first duly

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1 sworn, assumed the witness stand, was examined and
2 testified as follows:

3 CHAIRMAN VAN LOON: The floor is yours,
4 Mr. Jacoby.

5 DIRECT EXAMINATION

6 BY MR. JACOBY:

7 Q Good morning, Mr. Fine.

8 A Good morning.

9 Q Would you describe to the Arbitration
10 Panel the issue that you were asked to look at for
11 purposes of your rebuttal testimony in this
12 proceeding?

13 A Yes. I was asked to look at the issue of
14 the importance of the musical work versus the
15 importance of the artist, and how each is a driver of
16 sales.

17 Q And what did you do in order to make an
18 analysis of that question?

19 A Well, what I did was I looked at two
20 different ways of analyzing how a work -- how the work
21 itself contributes to the success of album sales. If,
22 in fact, you were to take the supposition that the

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1 musical work was not important, and that, really, the
2 most important factor was the artist, then you would
3 expect to see the sales pattern of a particular artist
4 to sort of follow -- not a better term -- sort of a
5 curve, a bell curve.

6 You'd expect that when an artist is new
7 and unknown their sales would be low or lower than --
8 you know, at the beginning. Sales would increase over
9 a period of time as they became more popular. Then,
10 once they reached popularity, sales would be
11 maintained for a level. And then, as their popularity
12 waned, their sales would decrease.

13 So you would expect a rise, a pretty
14 consistent level for a while, and then a gradual or
15 hopefully a gradual decline. And that's what you
16 would expect if, in fact, the artist was strictly the
17 driver of success.

18 If the musical works itself or the songs
19 play a factor, then you would expect more up and down
20 sales. Artists would have albums with -- which the
21 public considered to be songs that they like better.
22 So you might have a successful album. Then you might

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1 have an album that was a little less successful. Then
2 it may bounce back again because the next album may
3 have songs that are better, etcetera.

4 And so I felt one way of looking at this
5 situation was to look at artists and see what their
6 patterns of sales have been since the inception of
7 Soundscan.

8 Now, you would expect that if you did
9 this, and you chose the most popular of artists, that
10 this would be the area where the popularity would
11 probably drive artists even more than the quality of
12 the song.

13 Q Drive the sales.

14 A Drive the sales even more than the quality
15 of the song. So using the top artist, you would
16 expect it to even be more difficult to show that the
17 song was important, because you're so popular, and if
18 that is the driver, then the songs would have less
19 impact. Whereas, if you were a less popular artist,
20 you would expect it would be easier to have the songs
21 having an effect.

22 So what I did was at first I took the top

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1 20 artists in what we call "the Soundscan era," since
2 1991 -- we have a chart in Soundscan that lists every
3 artist by how many albums they've sold. I started
4 with the most -- with the highest artist on the list,
5 went down to the first 20 artists that had at least
6 five releases in the 1900 -- in the 1990s, up to the
7 year 2000.

8 Obviously, if they only had one release,
9 you really can't tell a trend. So we decided five
10 would at least give us enough to be able to look at
11 sales. And we looked at and produced charts for each
12 of the -- of these 20. Actually, to get through the
13 top 20, we had to actually go through to our number 33
14 artist.

15 So out of the top 33 artists in the 1990s,
16 including the year 2000, 20 of them -- of the top 33
17 had five releases during that period.

18 And we looked at the sales over time of
19 each artist's album that was released during that
20 period and what their sales had been. And we produced
21 a chart for each one. If you'd like, we could just
22 turn to the first chart and get an idea of what it

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1 looks like. I don't think we need to go through each
2 chart. So --

3 Q Okay. And that would be found as Fine
4 Rebuttal Exhibit 1, which is found at Tab 13 in the
5 exhibit binders.

6 A And the first one is Garth Brooks.

7 Q These are in rank order, so Garth Brooks
8 was the top seller for the 1990s?

9 A Yes. The 20 artists are put in the order
10 that they appeared on the -- as best sellers. And
11 just looking at Garth Brooks, you can see that his
12 first album, which was -- actually came out during
13 1991, had sales of a little bit over \$9 million.

14 And as you look through, up to the year
15 2000, I guess even 2001, each of the albums that were
16 released, what their total sales have been to date.
17 And so as you go across you see the years and you see
18 the titles of the albums.

19 And we've done this for all 20, and I
20 don't think we need to go through. It's a fairly
21 self-explanatory pictorial of what their sales have
22 been.

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1 We looked at each of the 20, and, in fact,
2 there were a few where the sales do look like they
3 rise and then they fall. There were three in specific
4 that looked like that -- Metallica, Kenny G, and
5 Michael Bolton. The rest of the artists have various
6 different patterns that would indicate that, in fact,
7 the songs are playing an important part in the success
8 -- and we measure success by the number of units sold.

9 Some cases, people who were -- at the
10 beginning of the period sort of had low sales suddenly
11 have good albums. So it's sort of like a revival
12 situation. And you have cases of that nature.

13 You have cases of a nature where you have
14 a very successful album, then you have a less
15 successful album, then you have, you know, a couple of
16 less successful, then a successful, then a less, and
17 it goes up and down.

18 And I would suggest that -- and it's
19 fairly, I mean, accepted in the industry that these
20 changes in the success of albums -- all of these
21 albums -- in some ways, many of them may be
22 successful. You may sell nine million units of an

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1 album, and that would be very successful. The next
2 time you may sell two million units.

3 Now, two million is a successful album.
4 But, in fact, if it was strictly the artist that was
5 driving the sales, you wouldn't expect to go from nine
6 million or two million to four million to three
7 million to five million. All of those could be
8 successful albums, but you would not expect to see ups
9 and downs.

10 And, really, the explanation or the reason
11 that you have the ups and downs, by and large, are
12 caused by the fact that albums contain usually two or
13 three songs that consumers really like or -- and,
14 therefore, because they really like them, they're more
15 apt to buy them.

16 And I think this indicates the importance
17 of the musical work itself in relation to the artist.
18 Now, nothing that I'm trying to say says that the
19 artist is not important. But what I really think,
20 they're probably pretty close to equally important.

21 On a very, very popular artist, maybe it's
22 60/40 or something like that. As you go down the

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1 range a little bit, the music becomes more important.
2 Certainly, as you first start out, the music probably
3 is a little more important. As you become more
4 popularity -- more popular, your popularity can drag
5 you along.

6 But if you think of it as a two-pronged
7 situation, you have an artist and you have the musical
8 work, and you can say the artist is popular or
9 unpopular and their musical work is good or bad. I
10 think if you have a very popular artist with very good
11 music, you get a super hit. If you have a very
12 unpopular artist with very poor music, you get a very
13 big failure.

14 But I don't think, even if you have a
15 popular artist, if you have poor music, you're going
16 to get a very successful album. And so I think it's
17 really the need for the combination of both that's
18 really important. And while it's hard to quantify, my
19 guess would be or my opinion is that the quality of
20 the work is certainly as important as the performer
21 who is performing the work.

22 The second way to look at this is to look

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1 at a situation where you may have an artist who has a
2 very successful album, and sometimes people talk about
3 this using the term "one-hit wonders." It --

4 CHAIRMAN VAN LOON: Before you go to one-
5 hit wonders, I was curious, in terms of successful
6 albums, one I noticed was not on here under Eric
7 Clapton, is this year's Riding With the King, and --

8 THE WITNESS: It's probably.

9 CHAIRMAN VAN LOON: -- Reptiles here for
10 this year.

11 THE WITNESS: I'm not -- I think the scale
12 went to 2001, but I think we stopped at 2000 as far as
13 reporting sales. There may have been some, but I
14 would not look at 2001 as being significant, because,
15 obviously, it's so fresh and out so recently that you
16 don't -- you don't know what the sales are going to
17 be. It's really too short a period.

18 So I would not look at anything from 2001
19 to say this is good or bad or --

20 MR. JACOBY: What is the album that you
21 are referring to?

22 CHAIRMAN VAN LOON: It's called Riding

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1 With the King.

2 MR. JACOBY: A 2001 --

3 CHAIRMAN VAN LOON: Yes.

4 MR. JACOBY: -- release?

5 CHAIRMAN VAN LOON: Yes. It appeared on
6 many of the other exhibits that we received in the
7 direct. It's --

8 MR. JACOBY: Do you know the date of the
9 release? Do you remember when that was?

10 CHAIRMAN VAN LOON: No. And it occurred
11 to me maybe it's because it's B.B. King along with
12 Clapton.

13 MR. JACOBY: Oh, okay. That was the other
14 issue, which actually we'll come to later in his
15 testimony, talking about the collaborative album with
16 B.B. King, right.

17 THE WITNESS: We don't have collaborative
18 albums here or soundtracks.

19 CHAIRMAN VAN LOON: I see.

20 THE WITNESS: Okay.

21 MR. JACOBY: We will come to that
22 particular album in --

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1 THE WITNESS: And one other point. The
2 other thing, often, is that when you look at the
3 history of artists, their greatest hit albums tend to
4 do very well. In some cases, their albums may not be
5 doing well. Suddenly, you have their greatest hits,
6 it sells very well, and then the next album will not
7 sell as well.

8 I think this is another indication of the
9 importance of the content, because, obviously, if it
10 was just the artist then you would expect all albums
11 to do reasonably same. But if you put what obviously
12 the record companies consider to be the greatest hits,
13 or the best songs, and those suddenly do sell better,
14 then it's obviously being driven by the content of the
15 album, certainly, in those situations.

16 CHAIRMAN VAN LOON: Yes. And I stand
17 informed by my colleague here that the double
18 asterisks on the -- at the bottom of your exhibit
19 actually refers to that album. So I --

20 THE WITNESS: Yes. There's a thing in
21 Seltzer's analysis of -- which we'll get to.

22 CHAIRMAN VAN LOON: Okay.

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1 THE WITNESS: As I was saying about one-
2 hit wonders, or so-called one-hit wonders, you would
3 expect that, you know, if, in fact, the popularity of
4 the artist was the driving factor that this phenomenon
5 would really not exist. Certainly, a record company,
6 once they have a successful album, spend a
7 considerable amount of money promoting the next album
8 because they're hoping that they do have the artist.

9 They generally put out an album reasonably
10 -- within a year or two of the success of the first
11 album to try to capitalize on the artist's popularity.
12 And there are just, you know, many, many instances
13 that we could point to where you have this phenomena
14 of one-hit wonders, and then drop-offs of 80 percent,
15 90 percent in the next album, which would certainly
16 have to say something about the content being
17 important to the album that was successful.

18 I've presented a few of these in the next
19 set of exhibits. In some cases, it's the first album
20 that the artist does, and in other cases it doesn't
21 necessarily have to be the first. They may have had
22 one or two low albums, suddenly a real hit, and then

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1 the next one drops off 80 percent.

2 MR. JACOBY: For the record, Mr. Fine was
3 referring to Fine Rebuttal Exhibit 2, found at Tab 14.

4 THE WITNESS: And there was just -- off of
5 my own memory, I picked a few that I knew had this
6 phenomena. We could have went through and found many
7 more. And I think the point is that all of this is
8 contradictory to a hypothesis that says -- that would
9 say that, gee, the most important thing is the artist.
10 The content really isn't that important. An artist
11 puts out an album. It's going to sell because of the
12 artist.

13 Again, in summary, let me say I'm not
14 trying to say an artist is not important. I'm saying
15 that it's really a combination of an artist and the
16 musical works, the songs that appear on the album,
17 that lead to success.

18 BY MR. JACOBY:

19 Q All right. I'd like you at this point,
20 Mr. Fine, to turn to Dr. Seltzer's testimony. Do you
21 have a copy of that?

22 A Yes, I do.

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1 Q And, specifically, I'll ask you to turn to
2 page 10, where he directly addresses your testimony.
3 In Section 1 of -- this is subsection 1 of Section B,
4 I guess, of Dr. Seltzer's testimony, beginning on
5 page 10, Dr. Seltzer raises a question of whether or
6 not the correlation that you demonstrated in your
7 original direct testimony between the ratio of pre-
8 release detects to total detects in the year 2000 as
9 compared to the ratio of first week sales to total
10 sales in the same year was a "false" or "spurious"
11 correlation, and was really caused by artist
12 popularity.

13 First of all, let me ask you, do you agree
14 or disagree that artist popularity influences both
15 pre-detect -- detects and first week sales?

16 A I would agree with that.

17 Q Okay. Now, Dr. Seltzer then attempted to
18 do a -- what he called a partial correlation,
19 attempting to control for artist popularity. And
20 you've examined his analysis, have you?

21 A Yes, I have.

22 Q Okay. Do you have any comment about that

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1 analysis and the conclusion he reaches?

2 A Well, the first thing is let's take the
3 analysis that he's done. In a minute I'll address --
4 I don't think it's the best way to do this, but it's
5 certainly a way that you could do it. And if you look
6 at the results of his analysis, it comes out with a
7 correlation of .46, as he describes, and in his work
8 papers, which have been provided to me, that comes up
9 with a -- what they call a P of .001, which means that
10 the probability of this being -- of this correlation
11 happening by chance is less than .001, or the
12 reliability you could say is 99.9 percent.

13 If one was to have done this analysis and
14 said, "Gee, you have a correlation of .46," how would
15 one interpret that correlation? One would say, even
16 doing it this way, that air play is important to sales
17 and has a high correlation. .46 is still a fairly
18 high correlation. Not as high as .67, but still a
19 significant correlation.

20 So if you think about it in terms of your
21 conclusions, or what your -- or what the data tells
22 you, even doing it this way it says that air play does

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1 influence sales.

2 However, I would not have done this, and
3 the reason I would not have done this is we know that
4 the popularity of an artist is important, especially
5 for first week sales. Record companies, prior to
6 first week sales, go out and try to get radio stations
7 to play a song. It is much easier to have radio
8 stations play songs that come from popular artists in
9 the past than from new artists.

10 And, therefore, if you -- which we'll see
11 later -- when you look at the data, popular artists,
12 as defined by Dr. Seltzer, do get more air play prior
13 to release than new artists, and we would expect this.
14 But the effect is still the same. The best way, I
15 believe, to look at this phenomena, if you want to
16 call it that, is to look at our artists that we did,
17 the 54 artists, and break them into the two groups, as
18 Dr. Seltzer did, of new artists and established
19 artists. He has used those terms.

20 And then, look at the correlation
21 separately for the two groups, so you can look and
22 see, gee, what happens with new artists, and what

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1 happens with established artists. And you would
2 expect that the newer artists would have higher
3 correlation, and that the established artists, because
4 of the popularity, would have the correlation between
5 sales, and air play would not be as strong because
6 popularity is having an effect. And so we have done
7 that in Exhibit 3A.

8 Now, one thing that Dr. Seltzer did was he
9 used 1999 sales as the determinant to say whether --
10 if an artist had sales in 1999, and they were an
11 existing artist, if they had no sales in 1999, then
12 they were a new artist. And when he did that he came
13 up with 12 artists.

14 Eric Clapton and B.B. King was considered,
15 in his analysis, as a new artist, because it was a
16 collaborative effect, and they hadn't done one before.
17 So when you go into their database and you look at it,
18 you don't have previous sales.

19 For my analysis, I have moved them into
20 the existing artists. So when I did it I felt it was
21 fairer, because obviously there were existing artists,
22 and so my analysis is done on a split of 11 new

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1 artists and 43 existing artists. And if you look at
2 Exhibit 3A, the correlation for new artists is
3 actually .69, using the same methodology of the
4 proportion of sales and the proportion of air play.
5 And for established artists, it's actually .61.

6 And you can see that actually the .69 and
7 the .61 are higher than Dr. Seltzer's .46. And the
8 reason for that is because you're really stratifying
9 now into two groups. When you were doing the
10 correlation with all of them together, the effect of
11 the existing artist's popularity causes more ups and
12 downs, which, therefore, gives you a lower
13 correlation.

14 When you take the two groups out
15 separately, and you don't have the fact of existing
16 artist and established artist together, then each
17 group is a more pure group of its own, and you see the
18 correlation better. And that's why I think this is a
19 better way of looking at the effect of new artists --
20 of the popularity of existing artists.

21 Breaking it out into two sales, then
22 muddling the water by just "keeping them together,"

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1 we're controlling for something, but yet leaving both
2 types of artists together. As I say, when you look at
3 this, we've provided -- that was also provided -- the
4 statistical significance. And the reason that you get
5 a little bit below 99.9 -- and 98.1 is still so high
6 -- is obviously, as you get to smaller sample sizes
7 below seven, eight, nine, ten, the errors just tend to
8 be a little bit larger, just because of very small
9 sample sizes.

10 But still, you're saying that the
11 probability is 98.1 percent that this is not a random
12 occurrence or something equivalent.

13 Q All right. In subsection 2 of Dr.
14 Seltzer's analysis, he raises a couple of questions
15 about your original analysis, Mr. Fine. One is he
16 raises a question about why you chose to use a
17 comparison of ratios in your original analysis.

18 The ratio -- the two ratios, of course,
19 that you compared were the pre-detect releases -- pre-
20 release detects versus total detects is one ratio,
21 compared with first week sales to total sales. And
22 Dr. Seltzer professes ignorance as to why you chose to

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1 use that ratio. Would you explain to the Panel why
2 you chose to use the ratios as distinguished from
3 absolute numbers?

4 A I mean, there are many ways you could do
5 the analysis. One of the things I was trying to do
6 when I did the analysis initially was to provide the
7 Commission with a -- sort of a simple way -- I thought
8 it was simple anyway -- that would really try to show
9 the impact before the quality of the work became
10 important.

11 So what happens normally is a record comes
12 out, especially if it's an established artist, you'll
13 have pretty good first week sales because you're
14 basing the first week sales on the -- to some degree,
15 it's important both on the air play and on the
16 reputation of the artist. But then, if the work isn't
17 as good, sales will tail off, because as the critics
18 come out and people say, "Gee, it's not so good," word
19 of mouth, etcetera, etcetera, then sales will tail
20 off.

21 And so if you look at sales, just looked
22 at -- you know, if you looked at sales at the end of

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1 the period -- of the period, then you're looking at an
2 influence of not only the radio air play and the
3 artist, but you're also looking at the effectiveness
4 of the material.

5 And so what I tried to do in my analysis
6 was try to take that factor out and try to look at it
7 in its purest sense as you could, which is really at
8 the beginning when it -- when the album has first come
9 out.

10 So if you're going to look at that, then
11 I felt that the best way to look at that situation is
12 to compare how your sales were at the beginning versus
13 the end as a ratio, because then that takes -- and if
14 you use the ratio to detects and the ratio to sales,
15 you have a common area to compare the two.

16 There were other ways that this could be
17 done. I just thought that this way was the best way
18 to take out the quality of the work.

19 Now, if you think about the motion picture
20 industry, if they have successful actors, you know,
21 and if they've produced a movie that they feel isn't
22 that good, what they'll generally do is spend as much

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1 advertising as they can the first week to get the
2 audience in before the word can get out that it isn't
3 as good, because they want to recapture as much as you
4 can.

5 Again, to take away that phenomena of the
6 affect of the quality, of how people like the songs,
7 we did this analysis using first week's results or the
8 earliest results that we could. And that's the reason
9 for it.

10 Q Okay. Now, Dr. Seltzer also raises a
11 question about your initial study based on the fact
12 that in making the comparisons the denominators in the
13 ratios were based on the sales -- the detects or the
14 sales in each case for the balance of the calendar
15 year. And he suggests that it would be appropriate,
16 rather, to do a rolling analysis, actually parroting
17 a comment that Arbitrator von Kann raised with you, if
18 you'll recall in your direct testimony --

19 ARBITRATOR VON KANN: What did I say?

20 (Laughter.)

21 MR. JACOBY: You'll get to read it again.

22 We won't go over it.

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1 BY MR. JACOBY:

2 Q Do you have any comment on that particular
3 criticism or question that Dr. Seltzer raised?

4 A Yes. I think that using a full rolling
5 year is certainly a reasonable way to do this, and
6 possibly even better than what I had done. I chose
7 the method that I did because I felt that it was a
8 fair method, and, in fact, would fairly represent the
9 situation.

10 Would it have been better to use a 12-
11 month rolling average? Yes. It would have been more
12 difficult. We would have crossed over years. The
13 data set I was looking at was a one-year data set, but
14 it certainly could have been done. And I would say
15 with certainty that the results -- the numbers may be
16 slightly different, but the end conclusion would not
17 change.

18 Now, to test that, I did take the existing
19 data set, and I looked at just those titles that were
20 released prior -- July 2nd or sooner. And the reason
21 I did that, it would give all of those titles at least
22 six months, because the biggest effect in the analysis

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1 was really, as Dr. Seltzer pointed out, was that you
2 had a lot of titles that were released in November.
3 And so -- and so -- and he questions the effect of
4 that on the ratios, etcetera.

5 So I looked at just those titles of this
6 list that were released July 2nd or earlier and ran
7 the same exact analysis as we had done for those
8 items. If you look at Exhibit 3B, we have the results
9 of that analysis. And as you can see here, for the
10 first half-year releases, the correlation coefficient
11 in total is .71, doing it exactly the same way.

12 And for new artists, because I figured
13 once we're into this new artist/existing artist we may
14 as well look at everything that way -- that you would
15 be interested -- for new artists it actually goes way
16 up, as I would have expected, .85. And then, for
17 established artists, it's .46.

18 And so what you're really saying is here
19 -- is that there's still, even when you segment this
20 and look at only titles that were out for at least six
21 months, you actually even have a stronger result on
22 new artists and a fairly similar result on existing

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1 artists. It would not change any conclusions.

2 But certainly -- again, it just points to
3 the fact that radio air play is an important driver of
4 sales.

5 Q All right. Let's turn to subsection 3, if
6 you will, of Dr. Seltzer's commentary on your
7 analysis. And there Dr. Seltzer does an analysis of
8 pre-release detects, pre-release detect ratio
9 actually, to total sales, as well as absolute pre-
10 release detects to total sales, and finds no
11 statistically significant correlations.

12 Would you give us your opinion of that
13 analysis?

14 A Well, I think the analysis, to put it
15 nicely, is totally -- totally misleading and is
16 actually totally ridiculous.

17 Q Why is that?

18 A Well, it is certainly -- it's -- you're
19 not comparing -- you know, you're comparing apples and
20 oranges. You're taking total -- you're taking pre-
21 release detects, which is detects for a short period
22 of time, and taking total album sales. And what

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1 you're trying to say is the amount of air play that
2 something receives prior to being released, is that
3 indicative or can you predict total sales at the end
4 of some period of time.

5 And you would not expect that you could,
6 because if you could then everybody would know whether
7 something was going to be successful or not just based
8 on how much the radio played it before anybody even
9 purchased any albums. So, frankly, it's absurd.

10 The whole point is, when you take a --
11 let's look at it separately. When you take a new
12 artist -- a new artist, by Dr. Seltzer's own numbers
13 later on, gets very little air play prior to release,
14 and you expect that. And then, what happens? The
15 album is released. More radio stations start to play
16 it. Air play increases. So people buy it more.

17 So on any new artist, basically, you're
18 going to have much stronger sales by the end than you
19 would have based on strictly air play at the
20 beginning, which is going to be, by definition, low.

21 If you're going to do this, and I think
22 that this kind of analysis -- and it has somewhat

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1 usefulness -- and as I explained earlier, I didn't do
2 this, because I didn't want to take into consideration
3 the quality of the work. Once you look at sales,
4 total sales at the end, you're looking into the
5 quality of the work.

6 But if you are going to do this, then the
7 appropriate way to do this is to look at total detects
8 over the same period. You have total detects and you
9 have total sales, and look to see whether you have a
10 relationship that way.

11 Now, I did that in Exhibit 4A, which, as
12 it's headed, says, "This is a full -- this is the full
13 year 2000 analysis." We, again, looked at new artists
14 and established artists, and we're now looking at
15 total detects versus total sales. To some degree, the
16 popularity of the artist is now diminished a little
17 bit because it's over a longer period of time.

18 But now the success of the performance --
19 of the song itself plays more of a part, because now
20 over a period of time there has been either -- either
21 people have said this is a great album, it has great
22 songs, or it's okay, or it isn't. So there are more

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1 influences in here.

2 But even looking at this on a total basis,
3 total detects versus total sales, which would be the
4 only reasonable way if you wanted to take the attack
5 that Dr. Seltzer did, you still find correlations of
6 .65 for new artists and .42 for established artists,
7 pretty much the same as you had before, which, again,
8 says that you have a strong relationship between air
9 play and sales.

10 The probabilities or the reliability or
11 the chance that you have something by chance are still
12 very small, 99.5 for established artists, where you
13 have 43 cases; 97, which is still very high, where you
14 only have 11 cases. But still very -- but still would
15 come to the same conclusion, even just -- if you did
16 nothing else but look at this, you would still say air
17 play is a significant driver of sales.

18 Q And would you, then, just to complete the
19 analysis, explain what you did in Rebuttal Exhibit 4B.

20 A Well, 4B -- Dr. Seltzer then goes into
21 looking at this last thing which he has on his
22 page 15, where he takes the low pre-release and the

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1 high pre-release and looks at the sales ranks and
2 tries to say there's no difference.

3 Well, again, he's doing the same thing
4 here. He's just looking at it another way. He is
5 looking at pre-detects against total sales rank. He's
6 just looking at ranks rather than numbers. And,
7 again, it's the same fallacy. You cannot mix apples
8 and oranges. You can't take something only for the
9 pre period and try to say that's going to tell you
10 what's going to happen at the end.

11 If you want to do this analysis, then take
12 all of the detects and take all of the sales, or take
13 only the pre-detects and take only the first week
14 sales. Be consistent. You can't mix them.

15 And so in Exhibit 4B, I've done that.
16 I've taken the total -- total sales for the entire
17 period, by total detects, and I took only those --
18 well, in this case, I took only those that were
19 released during the first half of the year -- again,
20 trying to look at those low releases and the high
21 releases, and ran the same correlations.

22 And here you get correlations -- new

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1 artists again a little higher than existing artists.
2 And because you're down in nine cases, you're at 92.6
3 percent, which is still within the -- which is still
4 high for this analysis. And at the end, you'd come up
5 with the same conclusion again. If this is all you
6 looked at, you would still say that there are strong
7 indications of the effect of radio air play on sales.

8 And, frankly, I think that at the end of
9 the day Dr. Seltzer's criticisms -- nowhere in his
10 criticisms does he say that radio is not an important
11 driver of sales. What he's tried to do is he has
12 tried to show, well, the correlation may not be .67.
13 It may be .48, or it may be this, or it may be that.

14 But no matter what the numbers are, if you
15 do reasonable analysis of the data, if you don't mix
16 apples and oranges, then you're going to come out with
17 a conclusion that there is a strong relationship
18 between sales, air play, and sales. And at no point
19 are we trying to say that an artist's popularity is --
20 doesn't have an effect, has a greater effect at the
21 beginning than it would at the end, but it still has
22 an effect.

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1 Q All right. I'd like you to turn now to
2 Dr. Schink's analysis. Do you have a copy of his
3 testimony?

4 A No, I don't.

5 Q And I'll ask you to focus on his analysis
6 or his discussion of promotional effect of radio air
7 play, beginning on page 22 of his testimony,
8 specifically focusing on paragraph 42.

9 And here, as we see, this is actually a
10 commentary on Dr. Jaffe's analysis, but it is an
11 aspect of Dr. Jaffe's analysis in which he used
12 certain data points from your initial direct
13 testimony, some information which comes from the
14 Sounddata surveys that you described in your initial
15 direct testimony.

16 And, specifically, Dr. Schink focuses on
17 the point that case from one of your Sounddata surveys
18 that attributed 27 percent of record sales to radio
19 air play. And Dr. Schink concludes in this paragraph
20 that Professor Jaffe overstated the size of the
21 promotional benefit in using that 27 percent figure.
22 Would you comment on that conclusion by Dr. Schink?

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1 ARBITRATOR VON KANN: This is
2 paragraph 42?

3 MR. JACOBY: Yes.

4 ARBITRATOR VON KANN: Okay.

5 THE WITNESS: Well, I really have two
6 comments to make about it. The first thing --
7 actually, three. The first thing would be that I
8 believe that 27 percent is probably a conservative
9 number. It's my belief that radio air play impacts --
10 the effect on sales would be greater than 27 percent.

11 And I look at it, really, in two ways.
12 One is Sounddata and one is a logic statement and the
13 way the industry runs. The first thing is I asked
14 myself, if there was no radio, radio was cut off
15 tomorrow, and no songs were played on the radio, what
16 do I think the effect would be on sales?

17 And I feel pretty comfortable that sales
18 would drop more than 27 percent. The reason for that
19 is right now radio is the predominant way people learn
20 about a song.

21 An established artist doesn't start off as
22 an established artist. They start off as a new

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1 artist. And how are they exposed to the public? The
2 biggest exposure, both for new artists and existing
3 artists, when a new song comes out, is the radio. If
4 the radio was not available, the record companies
5 would have to promote in a different way. Until they
6 were efficient at promoting in a different way, sales
7 would drop off.

8 The only way that I can see right now that
9 a record -- what it would force the record industry to
10 do would probably be to promote through television.
11 Television is, by and large, in most cases too
12 expensive for record companies. They use television
13 very -- a very small percent of the artists and a very
14 small percentage of their releases because of the
15 prohibitive cost.

16 So in, really, an absurd situation where
17 there was no radio, I think the effect would be
18 greater than 27 percent.

19 However, if you just look at my Sounddata
20 survey, and the way Dr. Schink is using it, I think it
21 -- in a way it's a little -- it really would itself
22 say that the number should be higher. The question

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1 that the 27 percent comes from is basically a diary
2 question that asks somebody that just purchased it,
3 "What was the most important thing that made you buy
4 this album?"

5 So it's really to a large degree the last
6 thing that really drove them to buy the album.
7 Twenty-seven percent say that it was hearing the song
8 on the radio. Dr. Schink here suggests that, gee,
9 there are other reasons that affect sales, and so,
10 really, you can't say that all 27 percent -- that this
11 was the reason. Some of these same people had other
12 reasons, and this is just the last one, so the number
13 is probably less than 27.

14 The problem with that argument is there
15 are 73 percent of the people who said something else.
16 And those 73 percent also were influenced by radio and
17 might not had said radio at that time. So from a
18 logic standpoint, you've got 27 percent of the people
19 in one group, who a few of them may be the really
20 predominant was not radio, it was just the last, so
21 they may lose a few from the 27.

22 But you've got 73 percent on the other

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1 side, where radio may have been very important but it
2 wasn't the last thing that drove them. And so you're
3 going to pick up more from 73, just by logic, than
4 you're going to lose from 27. So going down the same
5 path as he does in his analysis, it would suggest that
6 27 percent is a minimum number.

7 Now, typically, a record consumer hears a
8 song on the radio. They hear it a number of times.
9 They get to like it. They're thinking about it.
10 Maybe it isn't on their mind when they first go into
11 the record store. They go in the record store. They
12 might hear it in the store. They might see it. There
13 might be a sale on it. There may be a point of POP as
14 they call it in the store. And then says, "Gee, you
15 know what? Yes, I'm going to buy it."

16 So when they answer, "Why did you buy it?"
17 "Well, it was on sale. I saw a poster. I saw it
18 advertised in the store." But, in essence, it was
19 really the radio that really got them interested and
20 got them to the state where that little last nudge got
21 them to buy it.

22 The person answering this question is not

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1 going to answer "radio" probably. They're going to
2 answer "the sale in the store or the POP." Because of
3 just the sizes of the two sales, I really think that
4 the 27 percent is a conservative number to use, and it
5 is probably considerably higher.

6 ARBITRATOR VON KANN: What's POP?

7 THE WITNESS: Point of purchase.

8 ARBITRATOR VON KANN: Point of purchase.

9 BY MR. JACOBY:

10 Q Can you explain what a point of purchase
11 is?

12 A Well, point of purchase could be anything
13 in the store. It could be a poster, it could be a
14 sign, it could be -- well, they have end caps with
15 just the title on it. It's the position in the store.
16 It can be a listening booth. It can be a number of
17 things in the store that just drive -- drive you to
18 make a sale.

19 There's approximately somewhere between --
20 about 35 percent -- almost one out of three sales
21 customers tell us are an impulse. They've walked into
22 the store to buy something, and they buy something

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1 else. This could have been some of these something
2 elses. They're going to answer that impulse that
3 caused you to buy it, and not necessarily the radio
4 that made you aware and made you really think about
5 buying it.

6 ARBITRATOR VON KANN: This is why my wife
7 doesn't let me do the grocery shopping.

8 (Laughter.)

9 THE WITNESS: Exactly.

10 MR. JACOBY: Are you a victim of the end
11 cap -- what's called the end caps?

12 ARBITRATOR VON KANN: Come back with lots
13 of things that weren't on the list.

14 MR. JACOBY: Anything that's on the end of
15 the aisle, right?

16 THE WITNESS: Well, or pretty pictures of
17 women or whatever else you want it to be, or the rock
18 groups.

19 BY MR. JACOBY:

20 Q All right. Would you turn now to
21 paragraph 43 of Dr. Schink's testimony on page 23?
22 And I'm just going to focus your attention on two

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1 sentences in paragraph 43 that begin -- it's the
2 fourth line of paragraph 43, in which he -- in which
3 Dr. Schink says, "First, webcasting play will be
4 incremental to radio play. The additional exposure
5 provided by webcast play should produce fewer
6 incremental album sales than are produced by the
7 existing radio play." Do you agree or disagree with
8 that statement by Dr. Schink?

9 A Well, I disagree with it. I may be
10 interpreting it differently than he does, but I
11 disagree with it. To me, a play is a play. If you're
12 talking about the effect on any one individual, then
13 one individual hears that -- hears that song or
14 performance on the radio, the effect on that
15 individual should be no different than if that person
16 heard it through streaming or whatever on the
17 internet.

18 All of advertising, or certainly all of
19 radio promotion, is based on the fact that you want
20 your customer to hear the song as much as possible,
21 because it is the repetitive hearing of a song that
22 drives a customer to want to buy something. Very few

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1 customers say that if they hear a song once they're
2 going to go out and buy it.

3 I've seen other testimony, and I think Mr.
4 McDermott talks about just the theory of the record
5 companies and how they promote records. The idea is
6 to get it onto radio stations and get it played as
7 often as they can on a station to create awareness.

8 And this is just like in any, you know,
9 consumer product out there. Advertising is not based
10 on making an impression once but compounding the
11 impression a number of times.

12 If you're saying, gee, the audience size
13 is greater on a radio station than on somebody
14 listening to a radio -- you know, a streaming
15 broadcast, and so the effect from playing on the radio
16 is greater, then I would agree, because there are more
17 people listening, you know, probably to a radio
18 station than there are to streaming.

19 However, you would say the same argument,
20 that a play on one radio station will have a different
21 effect than a play on another radio station. If you
22 have a radio station in New York or in Washington

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1 that's being heard by a half a million people, and you
2 have a radio station somewhere else that's being heard
3 by 20,000 people, then, obviously, the total effect on
4 sales is going to be different.

5 But I do believe that when it comes down
6 to a single performance, to a single customer, it's
7 down to one person hearing it once, I don't see how
8 you could think that there would be a different
9 effect.

10 Q Thank you very much, Mr. Fine. No further
11 questions.

12 ARBITRATOR GULIN: Let's go off the record
13 for one second.

14 (Whereupon, the proceedings went off the
15 record briefly.)

16 CHAIRMAN VAN LOON: Back on the record,
17 because I thought you probably might be --

18 MR. JACOBY: For the record, I'd like to
19 offer Fine Rebuttal Exhibits 3A, 3B, 4A, 4B, into
20 evidence.

21 CHAIRMAN VAN LOON: And is there any
22 objection?

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1 ARBITRATOR GULIN: Did you -- I don't
2 think you said you were going to file it. Did you say
3 you were --

4 CHAIRMAN VAN LOON: All four will be
5 admitted, but they just come in as part of the
6 exhibits. And, actually, that's why I get the two
7 copies. We file the hearing exhibits with the office.
8 So they're all four admitted.

9 (Whereupon, the above-referred
10 to documents, previously marked
11 as Fine Rebuttal Exhibits
12 Nos. 3A, 3B, 4A, and 4B for
13 identification, were admitted
14 in evidence.)

15 CROSS EXAMINATION

16 BY MR. NEWBERG:

17 Q Good morning, Mr. Fine. My name is Brad
18 Newberg, and I represent the Recording Industry
19 Association of America. The first thing I'd like to
20 do is go into your discussion about Dr. Seltzer's
21 testimony and your rebuttal exhibits.

22 In this chart, your Rebuttal Exhibits 3A,

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1 3B, 4A, 4B, and in your analysis during the first
2 phase of this proceeding, you started by taking the
3 most successful artist by sales in the year 2000. Is
4 that correct?

5 A Yes.

6 Q And then you looked at the detects and the
7 pre-release air play for these artists. Is that
8 correct?

9 A Yes.

10 Q And when you broke it down by new artists
11 and established artists in your rebuttal exhibit, your
12 sample size for new artists, at least in Exhibit 3A,
13 was 11.

14 A Correct.

15 Q So these, in essence, were the 11 most
16 successful new artists of 2000 by record sales.

17 A Yes.

18 Q Did you do any analysis of, say, the 100
19 new artists with the highest pre-release air play?

20 A No.

21 Q Did you do any analysis like that where
22 you looked at the artists with the highest pre-release

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1 air play to see what their sales ,were?

2 A No.

3 Q So your analysis does not account for any
4 artist that got high pre-release air play but still
5 had low record sales?

6 A Well, there was no -- the amount of record
7 sales is only a determinant factor based on how it
8 ended up at the end of the year. And the reason that
9 I picked doing it this way, there was a reason. First
10 of all, if I had gone out and picked some other way of
11 picking albums or artists, people would say, "Well,
12 why did you pick this one? Why did you pick that
13 one?"

14 And you would have had a -- there may have
15 been considered some -- someone may have thought that
16 I had biased the selection process looking for
17 something that would come out one way or the other.
18 By taking just the top, you take away all of that
19 bias. There is no selection criteria. I took the most
20 popular.

21 Also, by taking the most popular, I was
22 actually -- if, in fact, I was trying to prove a

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1 point, I was making it the most difficult, because I
2 do believe that as you go further down the list of
3 successful artists that the relationships actually
4 become stronger between air play and sales, because of
5 the fact that popularity of an artist, which has its
6 greatest impact at the beginning, would not be there.

7 And so as you looked at -- if you took
8 things that sold very little, number one, you would
9 probably find very little air play in a lot of cases,
10 so you couldn't do an analysis. But if you did go
11 further down, you'd find stronger relationships than
12 weaker relationships.

13 Q All right. But my question was -- wasn't
14 really why you chose what you did. It was asking
15 whether or not you took the -- whether or not your
16 analysis dealt with any of the, say, top 100 or top 50
17 artists with the highest pre-release air play to see
18 what their sales were.

19 And I think you mentioned there might --
20 you might be accused of some bias in that. And if you
21 just chose the top 50 or the top 100, what bias would
22 there be in that?

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1 A Well, I guess, but then one would say, why
2 did you start with number 40 and not number 100?
3 Because, again, the top slants it the other way. I
4 did what I did. And the answer to your question is,
5 no, I did not do that, because I presented to you why
6 -- what I did and why I did it.

7 Q All right. But this is -- you are putting
8 this forward as kind of a cause and effect analysis to
9 show that pre-release air play causes these sales.

10 A I'm using this to support the supposition
11 or the conclusion that says radio is an important
12 driver of sales. I've done many analyses over -- over
13 periods of time that looked at the relationship
14 between radio and air play, and in every analysis that
15 I've ever done I have always found that there is a
16 relationship between it.

17 If there was not a relationship between
18 it, the record companies would not spend most of their
19 -- of their promotional dollars on radio. Radio is
20 where all of the costs today, other than -- not all of
21 the costs, but the majority of costs in marketing a
22 record are for promotion, which is basically the

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1 effort of people getting radio stations to play songs.

2 If they didn't feel and know that, in
3 fact, there was a strong relationship, they wouldn't
4 do this because you would tell them that they're
5 wasting their money. So all I've done is I've picked
6 one analysis that I thought was sort of simple, easy
7 to do, didn't involve looking through a lot of data,
8 to show, in fact, the relationship between radio and
9 air play.

10 I could have done this 20, 30 different
11 ways and would have come up with the same conclusion.
12 And if I did it your way, which I could have done, I
13 would, again -- I would be positive -- actually, I am
14 positive I would come up with the same thing, because
15 that's why people spend their efforts trying to get
16 radio to play songs.

17 Q Well, I mean, don't you think in a cause
18 and effect analysis it might be helpful to look at the
19 cause first?

20 A What are you defining as the cause?

21 Q The pre-release air play.

22 A Pre-release air play causes sales,

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1 obviously, at the first week. Nobody would go out --
2 I mean, let's start off with a supposition. There is
3 no -- there is no publicity. There is no advertising
4 it whatsoever. A record company takes an album, puts
5 it in a record store, and waits to see what's going to
6 happen.

7 A typical record store would have, I don't
8 know, 10,000 different albums put in bins. How many
9 people, if they didn't know it was there, would buy --
10 while going through the bins, find this record and buy
11 it? I mean, it would -- you could probably count them
12 on your hand.

13 So you start off with the supposition that
14 you have a release date. This album is going to be in
15 stores on a certain date. What's your first thing a
16 record company wants to do? They want to make people
17 aware that this record is going to be in the store on
18 that date.

19 How do they do it? They do it a number of
20 ways. They may advertise in the newspaper. They may
21 do some TV advertising, which they do very seldom.
22 But the majority of the way that they get the message

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1 to the consumer is through radio, and the fact that
2 radio plays the song. That's why they put out a
3 single usually six weeks, eight weeks, before the
4 album comes out, to create the hype, to create the
5 awareness.

6 So, obviously, there has to be a
7 relationship between the prior detect and first week
8 sales. If people don't know about it, they're not
9 going to buy it. The more you make people aware of
10 it, the more chance you have of sales happening in the
11 first week. So there's definitely a relationship.

12 Q Well, if there was data showing that there
13 were a lot of albums that had high pre-release air
14 play but low sales, would that affect your analysis in
15 any way?

16 A No.

17 Q And why is that?

18 A I mean, it -- there would be some reason
19 -- I mean, first of all, if it was -- if it happened
20 all the time, then, definitely yes. If it happened
21 some of the time, you'd have to look and see what
22 happened to that album. What was the pre-release air

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1 play, and what was the publicity around that release?

2 And if the publicity around that release
3 was that it's a terrible album, then what you're
4 really saying is you're starting to get some of the
5 effect of the quality of the work playing a bigger
6 part earlier than people would hope. Certainly, that
7 could happen. If there's very bad publicity, even
8 though it may be played on the radio, then you would
9 have less correlation.

10 I mean, you -- as I said to you at the
11 beginning, it takes, really, both things to be
12 successful. You have to have a good work as well as
13 a good artist, I mean, to be the most successful. If
14 you have a -- if the work is not considered good and
15 people don't like it, they're not going to buy it
16 strictly because they heard it on the radio. So the
17 quality of the work does come into play.

18 And the reviews, if there are a lot of bad
19 reviews early in the game that get a lot of attention,
20 then that would affect sales and you could see some
21 air play without -- without the corresponding sales.

22 Q Well, you don't really need reviews, do

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1 you? Because people can actually hear the song when
2 they play it on the air before the release.

3 A If people hear it and they don't like it,
4 then they'll be less likely to buy it. And that's why
5 record companies spend so much effort trying to figure
6 out which song should be released first. I mean, you
7 have an album. That album is going to be released on
8 a certain date. It probably has 10, 11, 12 songs on
9 it.

10 You know, record companies make a
11 concerted effort to pick the right song that they
12 think will help justify the success of the album. If
13 the album is bad, though, you may pick the -- you
14 know, the best of the bad, and then you, in fact,
15 won't have sales. That could happen.

16 Q If I could just ask you, on these charts
17 that you did in Exhibit 1 --

18 CHAIRMAN VAN LOON: Excuse me. We need to
19 suspend for a second and go off the record.

20 (Whereupon, the proceedings in the
21 foregoing matter went off the record at
22 10:33 a.m. and went back on the record at

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1 11:05 a.m.)

2 CHAIRMAN VAN LOON: Well, we have worked
3 out a resolution to the location business. We're just
4 going to rename this building Arnold & Porter, and
5 we'll be set. We figured we should wait until late in
6 the day and see if we can get a further update from
7 Bill, any further information on all this.

8 Do we know yet whether we have an option
9 as earlier as tomorrow if need be?

10 MR. GARRETT: I am sure we have space.
11 The question is whether we have the best space
12 available. And I got something that we had set up for
13 this weekend, and it's pretty much the same fashion as
14 this room.

15 But we certainly have plenty of conference
16 rooms that are available, and so that will be able to
17 accommodate this.

18 CHAIRMAN VAN LOON: Well, this panel wants
19 the best space.

20 UNIDENTIFIED SPEAKER: We are going to
21 import the art.

22 (Laughter.)

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1 CHAIRMAN VAN LOON: We wouldn't mind a few
2 windows as a substitute. So, we could do it tomorrow
3 if need be, you're saying?

4 MR. GARRETT: Yes, yes.

5 CHAIRMAN VAN LOON: And do the parties
6 have a preference, one way or the other?

7 MR. STEINTHAL: Do you mean as between
8 here and Arnold & Porter?

9 CHAIRMAN VAN LOON: Yes. I mean, I
10 suppose there's a school of thought that says this
11 could be in flux every day back and forth.

12 MR. STEINTHAL: And the big thing is going
13 to be knowing when we have to move, that which we need
14 to move. It's not like the Steve Marks cross the last
15 time around where we had boxes and boxes of materials
16 that we had to have on-hand.

17 So, we are more portable. We just need to
18 have requisite notice to take what we need from here.
19 So that, if we -- if we know today at four o'clock or
20 five, preferably by four, that we're going to be going
21 to Arnold & Porter, that's going to be fine for us.

22 I suppose you guys have the same problems

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1 we do. You know, we can leave some of the stuff here
2 and just take, you know, what we need for the next few
3 days.

4 But I guess there is the -- one of the
5 issues is are we going to be closed down for, you
6 know, ten days, in which event we need to move
7 everything out of here? I guess we haven't -- that's
8 something we'll just learn more about.

9 CHAIRMAN VAN LOON: As far as we're aware,
10 there's, you know, no high profile recipient of
11 letters or anything here in Library. There's no
12 indication whatsoever, which is really different from
13 either the House or Senate office building where
14 they're getting tons of mail every day from all sorts
15 of people.

16 MR. STEINTHAL: But as we sit here today --

17 UNIDENTIFIED SPEAKER: And assuming that
18 the mail all goes to the right place, too.

19 MR. STEINTHAL: -- we're prepared to go,
20 you know, where -- you know, in the exercise of
21 caution, let's not take a chance about tomorrow,
22 starting tonight when it's going to be closed, or wait

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1 just, you know, until Bob tells us that they've got
2 the facilities, and we'll just show up there tomorrow
3 morning. It's not a big issue for us.

4 CHAIRMAN VAN LOON: Okay, we'll revisit
5 this then later in the afternoon when we -- when we've
6 got more information, and see whether there's more
7 preferences. Mr. Newberg, you were in the midst of
8 your questions.

9 MR. NEWBERG: I was.

10 CONTINUED CROSS EXAMINATION

11 BY MR. NEWBERG:

12 Q Mr. Fine, in your rebuttal testimony, you
13 state that -- tell me if I'm inaccurate -- that the
14 sales of records are partly driven by the underlying
15 musical works?

16 A Yes.

17 Q Now, when you were here previously, you
18 testified that radio air-play was the driving factor
19 for album purchases. Have you changed your view about
20 the driving factor behind sales, or are you just
21 saying now that there are various factors behind the
22 sales?

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1 MR. JACOBY: I'll object to the form of
2 the question, but -- because I think the foundation is
3 accurate, but I'll let the witness answer.

4 THE WITNESS: Okay, no, I think -- I think
5 there are a number of things that affect sales.
6 Obviously, you have to have a -- something to sell,
7 and so you have an album that has to be created. And
8 things go into creation of that album: the artist,
9 the music, okay?

10 And once you have the album, you have to
11 promote it, and you have to get people to buy it. And
12 there are various ways of promoting it. Radio is one
13 of them.

14 And the only thing that I've said is, is
15 that radio is an important driver of sales. It's
16 certainly not the only driver of sales.

17 BY MR. NEWBERG:

18 Q So, you agree that there are other drivers
19 of sales?

20 A Yes.

21 Q And the popularity of the artist might be
22 one?

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1 A Yes.

2 Q And the amount of promotion and
3 advertising spent by the record label might be
4 another?

5 A Yes.

6 Q Are displays in a store that consumers can
7 see?

8 A Yes.

9 Q Or hearing about an album from a friend?

10 A Yes.

11 Q Magazine reviews?

12 A Yes.

13 Q Seeing a music video?

14 A Yes.

15 Q Seeing an artist in concert?

16 A Yes.

17 Q Did you look over the -- any information
18 on the radio air-play detections or the pre-release
19 air-play on the albums in the charts you've presented
20 with your rebuttal testimony?

21 MR. JACOBY: I'm going to object to the
22 form of the question, but the witness can answer. I

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1 didn't understand the question.

2 THE WITNESS: Only if one of them happens
3 to, by chance, correspond to the 54.

4 BY MR. NEWBERG:

5 Q So, you didn't make any independent --

6 A No.

7 Q -- study? Okay. And just to be clear on
8 the purpose of your testimony here today, you reviewed
9 the Soundscan sales data for the 20 top-selling
10 artists since 1991, correct, if they had at least five
11 albums?

12 A Correct.

13 Q And charts showing that sales data can be
14 found at Exhibit 1 to your testimony, at least in bar
15 graph form?

16 A Yes.

17 Q Now, and a premise of yours was that an
18 artist -- if an artist's contribution was the primary
19 factor in sales, one would see a curve or a slope of
20 increasing or decreasing sales over time, correct?

21 A No, you'd probably see something more like
22 a trapezoid. You'd go up; you'd be -- sort of a

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1 pretty big -- you'd have a -- you'd go up; you'd have
2 a pretty big base across the top, and then you'd start
3 to come down. It wouldn't really be a curve.

4 Q In your testimony, you point out examples
5 where this was not the case?

6 A Correct.

7 Q And you conclude that such examples show
8 the public's positive or negative reaction to the
9 musical works?

10 MR. JACOBY: Objection as to form.

11 THE WITNESS: No, I'm only saying that the
12 -- that the reaction to the musical works is a driver
13 of sales, as well as the popularity of the artist.

14 BY MR. NEWBERG:

15 Q And in paragraph eight of your testimony,
16 you state that your review of the chart shows you that
17 greatest hit albums out-perform studio albums, apart
18 from any other sales trends for the artists, and that
19 this "strongly suggests that consumer purchases are
20 driven by the underlying works"?

21 MR. JACOBY: Objection as to form,
22 mischaracterizes testimony.

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1 ARBITRATOR GULIN: Mr. Jacoby, do you want
2 rulings on these objections?

3 MR. JACOBY: No, I just -- I am just
4 trying to maybe give notice to Mr. Newberg that he is
5 constantly mis-stating premises in his questions. And
6 for the record, I think I should do that, and maybe he
7 will take more care.

8 For example, he skips the word "generally
9 out-perform" that was testimony, and he skips the word
10 "generally". He's characterizing the --
11 mischaracterizing the testimony. I think it's
12 important for me to just make a record notice of that.
13 I'm allowing the witness to answer.

14 ARBITRATOR GULIN: Okay.

15 CHAIRMAN VAN LOON: I think we would
16 prefer, in the interest of time and to be consistent
17 with the way we've treated all of the other
18 objections, that if there is an objection to which you
19 would like us to rule, and -- and sort of seriously do
20 not want the witness to answer until you've received
21 a ruling, then let's have an objection. But --

22 MR. JACOBY: Well --

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1 CHAIRMAN VAN LOON: -- as to each and
2 every one as to form --

3 MR. JACOBY: Well, I don't want to do
4 that. But on the other hand, he is consistently --
5 counsel is consistently mischaracterizing testimony in
6 asking a question. And that's not appropriate.

7 ARBITRATOR VON KANN: Could we have a
8 standing understanding that if the witness thinks the
9 question mischaracterizes, he can correct that? Don't
10 feel bound by the form of the question. Say, "I
11 didn't quite say that, Mr. Newberg," or "You've left
12 something out," and he needs to qualify that.

13 MR. NEWBERG: Thank you, Your Honor. And
14 in fact, in the one instance where I said I was
15 quoting, if you have any problem with the language
16 that I said I was quoting, please let me know.

17 CHAIRMAN VAN LOON: Please proceed.

18 THE WITNESS: I think the question had to
19 do with greatest hits, and I said, "Generally
20 speaking" -- I mean, there are occasions where a
21 studio album can have sales higher, more than a
22 greatest hits.

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1 But what you see in some of these
2 situations was that albums were released. They seem
3 to be on a decline from previous albums. There's a
4 greatest hits that certainly sells well. And the next
5 album after the greatest hits sort of declines again.

6 And all I'm using is -- again as I said,
7 this would probably be the hardest case to make a case
8 of this because you do have the most -- in a lot of
9 cases, obviously the most popular artists.

10 And all I'm saying is that there is a
11 relationship between the song, as well as -- as well
12 as the artist. It isn't one that makes it without the
13 other. You need both.

14 And that content is important. If content
15 wasn't important, then you would expect, if you could
16 do this, you should be able to do this on every -- on
17 every album, if it didn't matter. I mean, if the
18 person -- if the only thing was the artist and it
19 didn't matter what they sang, then why would sales be
20 different from album to album if you put the same
21 effort in to promote it?

22 And if a record company felt that they

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1 could get nine million sales every time, then it
2 certainly pays to put in the effort. So, the reason
3 it doesn't happen is because sometimes the material is
4 better than other times.

5 And it's a simple, logical thing. This is
6 not, you know, something that isn't recognized in the
7 business.

8 BY MR. NEWBERG:

9 Q But you do say, do you not, in paragraph
10 eight that greatest hits albums generally out-perform
11 studio albums?

12 A Quite apart -- there's a second part to
13 the sentence.

14 Q Right, quite apart from any upward or
15 downward sales trends for the artist.

16 A Yes, there are times where inside the
17 trend, you can stop the trend by having a greatest
18 hits. And it depends on the artist. If the artist
19 doesn't have a lot of great hits, then the greatest
20 hits album won't be very good.

21 Q And you do say, and I'll quote here from
22 paragraph eight, that "This phenomenon strongly

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1 suggests that consumer purchase decisions are largely
2 driven by the songs contained on particular albums,
3 not simply by the popularity of the artist"?

4 A Yes. It's not one or the other; it's
5 both. It's not simply by.

6 Q And is it your testimony that if the
7 musical works themselves were at least as important as
8 the popularity of the artist, then you would -- you
9 would see this up and down trend in your charts, an up
10 and down where one album sold significantly --
11 significantly better than, say, an album prior or
12 subsequent to it?

13 A I'm saying that the change in sales among
14 an artist over a shorter period of -- over a short
15 period of time, a few years rather than 20 or 30
16 years, okay, that it is reasonable to assume that ups
17 and downs, given the same artist in the same stage of
18 their career pretty much, with the same effort behind
19 them, if not more effort on the subsequent one than on
20 the previous one, that if sales are not the same or
21 not better, then there's a -- it's reasonable to
22 conclude that that is caused by the material.

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1 Q But my question, my next question, is, is
2 it a logical conclusion that, if that is the case,
3 that the musical work is at least as important as the
4 popularity of the artist?

5 A It's my opinion, yes.

6 Q Well, let's take out promotion,
7 advertising, word of mouth, concerts, all the other
8 stuff that I mentioned for other factors. If the
9 artist -- the popularity of the artist was 80 percent
10 of the factor, and musical work, underlying musical
11 work, was 20 percent of the factor; say sound
12 recordings were -- you know, the artist's popularity
13 was four times as important, wouldn't you still expect
14 some significant rise and fall?

15 A I guess you'd have some, but I certainly
16 don't think you'd have up and down, and up and down,
17 and up and down. I mean, you would have pretty much
18 -- because if the words was only 20 percent, then it
19 would have much less effect, and it would not cause
20 you to go up and down very much.

21 And especially if you take that looking at
22 the example of one-hit wonders where you have a

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1 situation in those cases where the following album
2 drops as much as 80 percent or more, that certainly
3 would imply that the works is a lot more than just a
4 minor contributor.

5 Q Now, in your direct testimony, you relied
6 on a correlation analysis, a statistical correlation
7 analysis?

8 A In my first, I did.

9 Q Right.

10 A Yes.

11 Q Did you do any statistical correlations to
12 get to your conclusions in your rebuttal testimony
13 today regarding the importance of musical works?

14 A No.

15 Q So, your assumptions are based on your
16 general experience and these charts that show the
17 differences in sales among albums?

18 A Yes.

19 Q Before I get to these charts, let me ask
20 you, have you ever heard of a tribute album?

21 A Yes.

22 Q What is that?

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1 A It would be an album put out by an artist
2 that has a theme to it, some type of theme to the
3 album.

4 Q Have you ever heard of tribute albums
5 where an artist or a group of artists get together and
6 cover the songs of another artist?

7 A Cover songs -- cover -- yes.

8 Q For example, a tribute to Garth Brooks, or
9 a tribute to Madonna, where a bunch of artists get
10 together and do Garth Brooks songs or Madonna songs?

11 A Yes.

12 Q Do you have any view on how these albums
13 generally sell?

14 A Some sell well; some don't sell well.

15 Q And is that true, even though the tribute
16 albums are using the same underlying musical works
17 that the original artist used?

18 A It's -- I'm not sure how I can answer that
19 question. I mean, some of them -- some of them are
20 more successful than others.

21 Q Okay. Well, let me take a -- give you a
22 copy of what I'll mark as RIAA Exhibit No. 107 RPX.

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1 THE COURT REPORTER: Can you say the
2 number again, please?

3 MR. NEWBERG: Yes, it's 107 RPX.

4 (Whereupon, the above-
5 referenced document was marked
6 as RIAA Exhibit No. 107 RPX for
7 purposes of identification.)

8 BY MR. NEWBERG:

9 Q And then, while you're looking over that,
10 I'll have another chart marked as RIAA Exhibit No. 108
11 RPX.

12 (Whereupon, the above-
13 referenced document was marked
14 as RIAA Exhibit No. 108 RPX for
15 purposes of identification.)

16 BY MR. NEWBERG:

17 Q If I could ask you to look at these two
18 exhibits, 107 and 108, and also if you could just have
19 handy your Chart One of your Exhibit 1, your Garth
20 Brooks chart? Now, as you can see from Chart One that
21 I've handed out, which is 107 RPX, the album in blue
22 is "Fresh Horses," which was released on November

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1 21st, 1995. And I believe that is on your chart, is
2 it not?

3 A Yes.

4 Q Now, next to it is an album called "Hats
5 Off, a Tribute to Garth Brooks," which I've attached
6 the track listings for "Hats Off, a Tribute to Garth
7 Brooks". And this isn't on your chart, but we've
8 attached the Soundscan data as well.

9 And would you agree with me that "Hats
10 Off, a Tribute to Garth Brooks" sold 7,368 copies?

11 A Yes.

12 Q Now, is there any album on your Exhibit 1,
13 Chart One of Garth Brooks that sold anywhere close to
14 the range of 7,368 copies?

15 A No.

16 Q Yet, this is a tribute album using the
17 same underlying works that Garth Brooks has used?

18 MR. JACOBY: Is that a question?

19 BY MR. NEWBERG:

20 Q Is that correct?

21 A I don't know. I mean, it's a -- the
22 artist -- it's various -- it's various artists is what

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1 that says, and the title of it is "Hats Off".

2 Q Are you familiar with Garth Brooks' --

3 A Yes.

4 Q -- music at all?

5 A A little bit.

6 Q Could you take a look at the track list?

7 Have you ever heard of songs like "Friends in Low
8 Places"?

9 A Yes.

10 Q Do you know that to be a Garth Brooks
11 song?

12 A I believe that is.

13 Q And so, if you assume that all of these
14 songs are Garth Brooks recordings re-done, can you
15 explain why a tribute to Garth Brooks, using his
16 underlying works that were hits for Garth Brooks, sold
17 7,368 copies, while a general studio album of Garth
18 Brooks sold over 3.8 million copies?

19 A I mean, there would be a couple of
20 reasons. And one is the obvious reason, that Garth
21 Brooks has -- that Garth Brooks is a popular artist,
22 and popularity and the performance of the -- of the

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1 artist has something to -- has something to say about
2 the success of an album. And I've never said that
3 that isn't important.

4 The second thing is, I'm not sure who
5 released this. The artists may not be a group of
6 artists, obviously if they're totally unknown, that
7 people would necessarily go out and buy.

8 The record companies may not have promoted
9 it as well. And I don't know that you're really
10 comparing -- what you're trying to compare is really,
11 again, an apples and orange situation.

12 All I'm suggesting in my analysis is that
13 given an artist and given the popularity of an artist
14 -- and there are artists who are better than other
15 artists. And therefore, if an artist is better, they
16 will have more sales than another artist.

17 But given the artist -- and that's a
18 constant. You have Garth Brooks. Now, he's putting
19 out a number of albums. Garth Brooks is putting them
20 out, not other people.

21 If, in fact, the only thing that mattered
22 was the fact that Garth -- Garth Brooks puts it out,

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1 then you would expect to see why did sales go from
2 nine million on his very successful 1991 album down to
3 under three million, back to five million, a little
4 over four, back up to eight, down to four, back to
5 almost six?

6 I would say that a reasonable explanation
7 for all of this up and down is caused by the quality
8 of the work. It's the same performer, very popular in
9 the 1991 to 1995 area.

10 Country is an interesting group of
11 artists. They generally put out something every year,
12 so that you really are trying to capitalize on the
13 popularity of the artist.

14 If you can't maintain it over a short
15 period of time, and you have the ups and downs, I
16 would think a reasonable reason for that is difference
17 in acceptance of the quality of the work and how
18 people feel about the songs.

19 Q But those answers, the second half of your
20 answer about the quality of the work, that doesn't
21 explain why the tribute album did so much worse than
22 Garth Brooks' "Fresh Horses." That goes -- if you

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1 would let me just finish, that goes back to your
2 answer that the popularity of the artist does have
3 some effect, and the promotion of the label does have
4 some effect?

5 A And the songs, and the popularity -- and
6 who is singing it, and maybe the quality of the work,
7 and how it is presented. There's a lot of things.
8 But certainly, I am not saying that the popularity of
9 the artist does not have an important effect.

10 Q But when you -- just to clarify, when you
11 said "the quality of the work" there, do you mean the
12 quality of the underlying work or the quality of the
13 sound recording, given that here, it's the same
14 underlying work?

15 A Well, it may be the -- it may be the art
16 cover. It may be a lot of things that would cause --
17 that would cause a tribute put out by a different
18 label, not his label -- I'm sure this was not
19 necessarily released by the same label that is
20 promoting Garth Brooks.

21 I can't -- I just can't tell you why it --
22 why it would happen.

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1 Q So, the identity of the label could also
2 be --

3 A Well, I'm only using --

4 Q -- a factor?

5 A I'm only thinking of it in the sense of
6 the -- if it's put out by an independent label for
7 some reason, and I don't know who put it out. And the
8 amount of money that they've spent to promote it may
9 be different than a major label getting behind an
10 artist.

11 Q Okay.

12 A But it's -- it's a factor -- there's a lot
13 of factors that go into selling an album.

14 Q And your answer would be the same for 108
15 RPX, I would imagine, the "New Friends in Low Places"
16 that sold about 26,000, 27,000 copies, while "In the
17 Life of Chris Deams" released a month later sold 1.1
18 million?

19 A Yes.

20 Q And if I could just give you one last --
21 one of these tributes to look at, 109 RPX, and we've
22 got more of these tribute albums here. But in the

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1 interest of time and not going through nostalgia,
2 we'll stick with The Beatles here.

3 And here, I guess your answers would be
4 the same for this "20th Century Masters: A Tribute to
5 The Beatles," that sold 833 copies and the 92 copies
6 for the instrumental jazz tribute, as opposed to
7 "Beatles One," which was their recently released
8 greatest hits album?

9 A Well, I mean, this seems to say that there
10 is a series of 20th Century Masters of different
11 artists. And this series wasn't very -- doesn't
12 appear to be very successful. All of the artists sold
13 very few, and that may be more about how it's
14 promoted, where it's promoted, the target audience,
15 etcetera, than anything else.

16 (Whereupon, the above-
17 referenced document was marked
18 as RIAA Exhibit No. 109 RPX for
19 purposes of identification.)

20 BY MR. NEWBERG:

21 Q So, the same musical work done in
22 different sound recordings by different artists may

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1 have success or not success because of the target
2 audience as well. Is that correct?

3 A The timing of it, the target audience,
4 other songs that are on the album, how people feel
5 about it, how many times the song has appeared, you
6 know, on an album; you may have a -- have a hit song
7 that's appeared on four or five different collections.
8 So, the next collection of it does not do as well.

9 Q Okay.

10 A But I think the basis is, if you look at
11 studio albums and look at the trends, studio albums,
12 you know, there are differences. Individual albums
13 put out by artists, they go up and down. And the fact
14 that they do go up and down, I say, is attributed to
15 the musical works on the album.

16 Q Okay. Well, let's just take a look at a
17 few of your charts here. We'll stick with The
18 Beatles. That's Chart Two. And just before I ask you
19 a question about the chart, what's on the chart
20 specifically, do you see any -- any album on this
21 chart that approaches the range that the tribute album
22 we just discussed, 833 copies sold?

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1 A No.

2 Q Now, in your testimony, I believe you
3 refer -- let me just be sure that I'm not mis-stating
4 you. I believe you refer to The Beatles in paragraph
5 eight as an example of where the greatest hits
6 collection sold substantially more than the albums
7 these artists had released directly preceding or
8 following the greatest hits release.

9 A Yes. I mean, I point to it because it's
10 one of the 20 artists that met the criteria on --
11 within -- within this thing. The Beatles is probably
12 not the best example because they are an older band,
13 and a lot of their success occurred 20 years ago, and
14 that obviously, they weren't together and had some
15 demise when some of these albums were put out.

16 But it just points out that, in this
17 particular case, they did -- you know, a top hit album
18 did very well.

19 Q Well, weren't they, The Beatles, broken up
20 before 1991?

21 A Yes.

22 Q And so, aren't all of these albums

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1 essentially hits compilations?

2 A Pretty much, though some have some
3 original materials that weren't. But they are -- and
4 here is one that, you know, particularly did well.
5 And I just point to it; I mean, there are other
6 examples of -- of top hits in the list that are --
7 that I think are better representative of what
8 happened to The Beatles.

9 Q Right. Well, but here is my -- what I'm
10 -- what I'm getting at, Mr. Fine, is that in your
11 testimony, you specifically refer to this chart as an
12 instance where the greatest hits album did
13 significantly better than albums preceding or after
14 it, but in this case, we'll say preceding.

15 And my question is, aren't you just saying
16 that this greatest hits album did better than other
17 hits albums?

18 A Yes, except for the "Live at the BBC,"
19 which was not necessarily a hit album. It had not
20 been released prior, but was an individual performance
21 album that was released. And it certainly did not do
22 as well as the hits albums do.

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1 Q Do you know if the "Live at the BBC" album
2 was a case where The Beatles performed live songs that
3 were already on other albums?

4 A They probably have some -- have some songs
5 on it.

6 Q Do you know if sometimes live albums of
7 the same underlying musical works that an artist has
8 on other albums do better or worse than the studio
9 albums?

10 A Could you repeat the question?

11 Q Sure, maybe I can make it clearer. On
12 live albums, you said that sometimes -- well, I don't
13 want to, again -- what you said -- but you agree that
14 on live albums, the artist often makes live sound
15 recordings of the same musical works that are on his
16 other albums?

17 A In many cases, yes.

18 Q And is it your experience that these
19 albums sometimes sell significantly worse or better
20 than the studio albums?

21 A They usually do not sell as well as studio
22 albums.

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1 Q And do you have any explanation for why a
2 different recording by the same artist doing the same
3 musical works would sell fewer albums?

4 A On some cases, it's because if you have
5 had very successful albums initially, people have
6 bought it. And if there are a couple of songs that
7 they like and they already own it, they don't need to
8 buy it again on a live recording.

9 Q So, that might be the case for this "Live
10 at the BBC" as well?

11 A It's possible. And as I've said, and I
12 have said to you, I don't think The Beatles, because
13 of where they are in their career, is -- possibly, I
14 should not have mentioned it, if that would make you
15 feel better.

16 But the other ones in the group I think
17 are much clearer examples. The Beatles would not be
18 as clear of an example because of -- of just their
19 situation.

20 Q Okay, that's fair enough, and we can move
21 on from The Beatles after one last question, actually.
22 If we assume that "Beatles One," the album that did

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1 better, are the -- are the songs that reached number
2 one for The Beatles, if your premise is correct that
3 greatest hits albums generally do better studio
4 albums, would it -- would it be proper to say that
5 number one greatest hits do better than --

6 A I mean, I don't --

7 Q -- do even better?

8 A -- I don't know, but obviously, if you
9 have an album that has the biggest of the hits,
10 there's a greater probability that that will do better
11 than an album that has less of the hits, if you're
12 comparing different hit albums.

13 But it would also depend upon, to some
14 degree, when the album was originally -- you know, how
15 the individual songs were originally sold, how long
16 ago. Are you creating a new market of people who --
17 maybe, you know, not using The Beatles, but I mean,
18 hypothetically, if you have an artist whose career has
19 suddenly taken off again and maybe most people who
20 bought the songs, that was ten, 15 years ago, and now
21 you have a new audience who maybe has not bought the
22 album ten or 15 years ago, then you have less

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1 effective previous sales for -- for the new album.

2 But generally, greatest hits albums,
3 because of the fact they -- they have their songs that
4 were the most popular, do sell well.

5 Q And if we could just turn to the next
6 chart, which is Mariah Carey, it looks to me like she
7 has actually a number one hits compilation as well
8 released in 1998. Do you know if that's correct?

9 A I'm not sure that it was all number ones,
10 but it was a hit compilation.

11 Q Fair enough. And is it correct to say, by
12 looking at your chart, that her number ones -- her
13 hits compilation named "Number Ones" did slightly
14 worse than the album released before it, and slightly
15 better than the album released after it?

16 A Would you repeat that again, number --

17 Q Is it fair to say, looking at your chart,
18 that Mariah Carey's hits compilation named "Number
19 Ones" did slightly worse than the album that preceded
20 it, and slightly better than the album subsequent to
21 it?

22 A Yes.

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1 Q So, this might be another example of where
2 the greatest hits album didn't do significantly better
3 than the studio albums?

4 A That's possible. I think this particular
5 graph -- the important thing in this graph is the real
6 significant drop between "Daydream" and "Butterfly".
7 And in fact, you have two studio albums, one right
8 after the other, with such a significant drop that
9 would certainly indicate that the material was not as
10 well received on "Butterfly" as "Daydream".

11 Q Well, let's talk about that then. I
12 wasn't going to get into that, but let's talk about
13 that. You had said before when you testified earlier
14 that if the artist was the most important, you would
15 get a bell curve.

16 And then, I asked you about that, and you
17 said it's actually more of a trapezoid, that it would
18 go up, steady, and come down. Now, isn't that pretty
19 much what we're seeing here with Mariah Carey?

20 She has "Emotions". It starts to go up,
21 and then it starts to come down?

22 A Yes, I would think that you would not have

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1 the drop that you would have between "Daydream" and
2 "Butterfly". That's not a -- that's not a small drop.
3 I can tell you that the record company, I'm sure,
4 spent significant dollars promoting "Butterfly". It
5 was considered -- it was considered an unsuccessful
6 record.

7 I can tell you also that they certainly,
8 based on the relationship -- and this is another
9 peculiar situation. Mariah Carey was married at the
10 time to the president of the record company, and he
11 was certainly spending as much money as he could to
12 make his wife successful.

13 And so, I would suggest --

14 MR. GARRETT: Are they still married?

15 THE WITNESS: No. But I would certainly
16 suggest that here's a case where it wasn't promotional
17 dollars that had any factor. And in fact, they were
18 spending -- because I happen to -- I mean, you know,
19 this was my business. They were spending all they
20 could to make this record successful.

21 BY MR. NEWBERG:

22 Q And do you have any specific inside

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1 knowledge about that?

2 A It's been written in the trades. I'm sure
3 you could find articles if you went back at the time.

4 Q And do you --

5 A But --

6 Q Do you know how many dollars were spent --

7 A No.

8 Q -- on "Butterfly" as compared to
9 "Daydream"?

10 A No, but I would -- if I had to guess, I
11 would tell you it was probably as much on "Daydream"
12 certainly because they pulled out all the stops to try
13 to make that successful.

14 Q That's a hypothesis you're making, though?
15 You don't have any data on it?

16 A Well, it's pretty well industry --
17 industry knowledge.

18 Q Okay. Let's skip over Metallica since I
19 think you actually -- you actually state in your
20 testimony, at footnotes -- at footnote three, that
21 Metallica actually is a chart that demonstrates an
22 expected life cycle pattern of an artist?

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1 A Yes.

2 Q Okay. So, let's move over Metallica into
3 Celine Dion. And this is another one -- you said The
4 Beatles might not be a good example, but the other
5 ones in your testimony where you say that greatest
6 hits generally out-perform the studio albums, that
7 this -- there are other ones that might be better
8 examples.

9 Is this one of the ones that you would
10 consider --

11 A No.

12 Q -- a better example?

13 A And I didn't say that they always
14 generally out-perform. I said there are times where
15 they will do better than preceding albums or
16 subsequent albums within the span of a career. Now,
17 in Celine's case, she has had -- she had the
18 soundtrack from a movie which was a super-hit, that of
19 course would not -- would not fall into this analysis
20 because it was a soundtrack and there were other
21 people on it.

22 And I would certainly say that, you know,

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1 she is still obviously a very successful artist. Her
2 sales are still very high. She is more -- more in --
3 you know, she is still at the top, and we haven't seen
4 a decline in her sales yet.

5 But I would still say that the material is
6 important and, you know, the fact that she put out a
7 small album, "These are Special Times," which had some
8 -- certainly at four million sales, is a successful
9 album.

10 The point is, afterwards, they put
11 together a compilation album of hits, and she sold six
12 million. So, all I'm saying here is that obviously,
13 the difference could be attributed in some cases here
14 to the fact that you're going from a successful album
15 at four million to an even more successful album at
16 six, because people bought it because they were hit
17 songs that they liked and it was a way to buy, you
18 know, hits.

19 I mean, there's -- there's -- in the
20 record business, there is a -- there is a controversy
21 of whether you put out greatest hit albums, or
22 compilation albums, which are greatest hits of various

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1 artists. And the point is, how much does it count as
2 sales because if you're giving people just the songs
3 that they like, obviously they'll buy it because they
4 like those songs.

5 And they may not have to buy the album
6 that it came from. And so mostly what you're looking
7 at here, or you hopefully are looking at here, is
8 you're looking at taking hits from artists that are
9 established for a period of time and just putting them
10 together and getting another surge of sales.

11 And those are successful because people
12 like the songs moreso than just the artist.

13 Q And you're pointing -- but let me get back
14 to my question. You point to -- in your testimony, to
15 Celine Dion as an example where her greatest hits
16 album sold substantially -- let me quote it, "Sold
17 substantially more than the albums" -- and you're
18 talking about a group of artists -- "these artists had
19 released directly preceding or following the greatest
20 hits release."

21 A Yes, and if you look at this, it goes --
22 the previous album sold four million, and this sold

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1 six million. It's 50 percent more.

2 Q And the previous album is "These are
3 Special Times"?

4 A Right.

5 Q Now, do you happen to know what songs are
6 on "These are Special Times"?

7 A No.

8 Q Do you happen -- do you know whether it is
9 a studio album at all?

10 A No.

11 Q Is it possible that "These are Special
12 Times" is actually a compilation of Christmas songs
13 done by Celine Dion?

14 A I can say anything is possible. I haven't
15 -- I did not investigate what was on each of the
16 albums.

17 Q So, you didn't do any investigation into
18 what these albums were before you made your conclusion
19 that "All the Way...A Decade of Song" was an example
20 where a greatest hits sold substantially more than the
21 album before it?

22 A Well, it did sell substantially more than

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1 the album before it.

2 Q Than the studio album before it?

3 A Than the album before it.

4 Q But your testimony does say "the studio
5 album"?

6 A Yes.

7 Q I just want to hand you, so you have it,
8 what we'll mark as 110 RPX. It's the track listing
9 and some reviews for everyone to look at, which is the
10 track listing for "These are Special Times".

11 And if you could turn to page two of the
12 track listing right there, and would you agree with
13 me, looking at the track listing, that these are all
14 classic Christmas songs that Ms. Dion has covered?

15 A Yes, it is an album of Christmas songs
16 that she is singing.

17 (Whereupon, the above-
18 referenced document was marked
19 as RIAA Exhibit No. 110 RPX for
20 purposes of identification.)

21 BY MR. NEWBERG:

22 Q And would that affect your analysis at

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1 all?

2 A Well, it still is -- I mean, these are not
3 necessary her songs. I mean, most of them are not her
4 songs. She is singing a compilation of songs, okay?
5 But yet, when the next release was of -- was of hits
6 of her songs, okay, they did sell -- her sales do go
7 up.

8 And to the extent that it isn't as clear-
9 cut as if was a studio, I would agree with you. But
10 I would still fall to the premise that by and large,
11 that the fact that hit albums by artists sell well is
12 an indication that, in fact, it is the songs that are
13 important as well as the artist.

14 We're still not minimizing the importance
15 of the artist. We're just saying that both are
16 important.

17 Q Well, isn't it the case that if you go
18 back and look at her previous studio album, "Let's
19 Talk About Love" in 1997, that "All the Way...A Decade
20 of Song," her greatest hits album, actually sold three
21 million fewer copies than her studio album?

22 A That's right.

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1 Q So, this really wouldn't be a very good
2 example of showing where the greatest hits album did
3 significantly better than the prior studio album?

4 A This would not be a good example of that.
5 What Celine has here basically is two very big hit
6 albums prior to the release of the hits, two albums in
7 '96 and '97. And those were very successful albums.

8 And then, she put out a hit album that was
9 still successful, and successful based on the fact
10 that -- I believe because it contained the songs
11 people wanted to hear.

12 Q Well, I'm confused. I thought your
13 testimony says that when greatest hits albums -- that
14 "Greatest hits albums generally out-perform studio
15 albums," and that this phenomena means that people
16 like the underlying works of the hits, the things that
17 made hits better, and so they sell better.

18 Isn't that what you point to Celine Dion
19 in your testimony for?

20 A I pointed here to the fact that when she
21 had a hit album, she had success selling songs that
22 were more successful than her previous album.

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1 Q But in fact, that's not the case?

2 A It wasn't a studio album in the definition
3 of a pure studio album; that is correct. And if you
4 would turn to Chart Seven, to George Strait, or to the
5 next one where you've had greatest hits -- George
6 Strait is an example. You have an artist who has many
7 albums out there that are selling.

8 His career seems, in the 1995, '96, '97,
9 '98, '99, to sort of be on a down-swing. And then, he
10 puts out a greatest hits album, doesn't sell as well
11 as some of his older albums, but it certainly sells
12 better than his previous albums over a period of time.

13 And this is something, of course, that
14 just came from the top 20 artists. If you were to
15 expand this to other artists, you would find even
16 bigger differences where, in less popular artists,
17 greatest hits have even a bigger effect.

18 Q But your testimony does focus on the top
19 20 artists, does it not?

20 A Right.

21 Q And so far, the first two examples we've
22 gone through that you mentioned specifically in your

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1 testimony, which I haven't skipped any, do not prove
2 the point that greatest hits albums did substantially
3 better than the album -- studio albums prior and
4 subsequent to.

5 A Okay.

6 Q And actually, I believe the next, which we
7 really need to get into -- but I believe the next
8 chart is Chart Six, Kenny G, is the next one with a
9 greatest hits collection. And would you agree that
10 Kenny G's greatest hits collections actually did --
11 his greatest hits gift collection, as "Classics in the
12 Key of G," actually did significantly worse than his
13 other albums?

14 ARBITRATOR VON KANN: What chart number is
15 that?

16 MR. NEWBERG: Chart Six.

17 THE WITNESS: We've said that Kenny G
18 seems to show the -- more of the lifestyle pattern.
19 Here's an artist that seems to be on the way down.

20 BY MR. NEWBERG:

21 Q And his greatest hits albums didn't change
22 that pattern at all?

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1 A It didn't change the pattern. It did
2 better than his subsequent album and --

3 Q Now, which album is that?

4 A Well, greatest hits did better than
5 "Classics in the Key of G". But I've said that this
6 is more of a lifestyle example.

7 Q Just so we can get off this chart, do you
8 happen to know what songs are on "Classics in the Key
9 of G"?

10 A No.

11 Q Do you happen to know whether that's also
12 a hits compilation?

13 A No. But I've said that this -- this chart
14 appears to look like a lifestyle situation.

15 Q Let's move forward to another one that you
16 point to specifically in your testimony. I don't want
17 to take up too much more time with this, so I'm going
18 to skip to just a few that you point to specifically
19 in your testimony.

20 If you feel that there are any I skipped
21 that you would rather go through, please let me know
22 and we'll do so, okay?

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1 A Okay.

2 Q Let's go to Chart Ten, which is Reba
3 McIntyre.

4 MR. JACOBY: Didn't you skip Garth Brooks,
5 by the way? You may have mis-stated. You said you
6 covered each one.

7 MR. NEWBERG: I have covered each one that
8 he pointed to in his greatest hits, is what I said.

9 MR. JACOBY: Did you point to Garth
10 Brooks?

11 MR. NEWBERG: Did he point to Garth Brooks
12 and his greatest hits?

13 THE WITNESS: No, I don't think so.

14 MR. JACOBY: Yes.

15 MR. NEWBERG: Okay.

16 MR. JACOBY: That was the first one, and
17 you skipped that one.

18 MR. NEWBERG: Okay, we can go back to
19 Garth Brooks.

20 MR. JACOBY: Okay. You made a
21 representation that you had covered each one, and I
22 didn't want to leave a false representation on the

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1 record.

2 MR. NEWBERG: That's fine.

3 BY MR. NEWBERG:

4 Q We can go back to Garth Brooks if you'd
5 like.

6 A Okay.

7 Q I believe you discussed Garth Brooks.
8 That's why I went over it, but we can -- if you'd like
9 to discuss more with Garth Brooks, we can.

10 A No, Garth Brooks, I mean, I -- I just
11 point out that there were people that had hit albums.
12 Garth Brooks, his first -- his album, "The Hits,"
13 which was in 1994, sold considerably more pieces than
14 his two studio albums preceding and following, "End
15 Pieces" and "Fresh Horses".

16 Q And if you look at 1998, Garth Brooks put
17 out both a limited series boxed set and a "Double
18 Live". Do you happen to know whether those are also
19 hits compilations?

20 A There are hits on those.

21 Q And did those seem to follow a downward
22 trend from his previous studio album, "Sevens"?

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1 A Well, if you were to -- if you were to
2 combine the two of them, "Double Live" and "Limited
3 Series Box-sets," you'd have sales that would be
4 higher than "Sevens".

5 Q So, we would have to combine the two
6 greatest hits?

7 A Well, but you're putting them out in --
8 pretty much at the same time.

9 Q Do you know exactly when they came out?

10 A I couldn't give you the exact dates. I
11 could get them.

12 Q Do you know how they were promoted?

13 A I don't remember.

14 Q Do you know why "Double Live" did
15 significantly better than the boxed set?

16 A "Double Live" was probably -- I mean, I'm
17 not sure; I would guess it sounds like it was probably
18 less expensive, and probably had more promotion behind
19 it.

20 Q Okay, if we can go to Reba McIntyre now?

21 A Okay, are we still on greatest hits?

22 Q If you'd like to go on --

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1 A No, I mean --

2 Q If you'd like to point out --

3 A Is that why we're going to Reba?

4 Q I'm actually looking at it because you
5 pointed out Reba for two reasons. But like I said,
6 I'd be happy to go through any --

7 A Well, you have George Strait, which is
8 Chart Seven, which I also point out his "2000 Greatest
9 Hits". And all I'm really pointing out here is
10 that's you've had -- you've had a situation where a
11 lot of his album sales have sort of gone down.

12 And suddenly, he puts out a greatest hits,
13 and he gets a -- it becomes successful, more
14 successful than his previous album. Again, it's a
15 function of the artist, George Strait, and the fact
16 that he has now compiled a group of hits that people
17 want to hear.

18 He puts it out together. And the
19 combination of the two makes for a success.

20 Q And which of George Strait's greatest hits
21 albums on this chart are you pointing to?

22 A To the one at the end of 2000?

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1 Q "The Latest Greatest `Straittest Hits"?

2 A Right.

3 Q And looking at the album right before that
4 that says "Christmas" and the album prior to that says
5 "Merry Christmas, Wherever You Are" --

6 A Okay.

7 Q -- do you --

8 A Well, those, I would assume, are very
9 limited. And I'm looking more at what's happened
10 compared to "Always Never," "One Step at a Time," and
11 his -- his general studio albums were on a sagging
12 basis.

13 I wouldn't profess to say that because
14 "Christmas" did poorly that you're comparing it to
15 "Christmas". But you're comparing it to a trend. It
16 isn't one -- the whole idea here is that you're not
17 looking for individual, isolated cases.

18 You're looking for a trend. In this
19 particular case, it fits the situation where his sales
20 on studio albums were on the decline and came up with
21 the greatest hits albums, and his sales bumped up
22 again.

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1 Q I'm sorry; I just don't see the decline.
2 Perhaps, you could point it out. I see that "Latest
3 Greatest Straitest Hits" sold slightly better than
4 "Always Never the Same" and slightly worse than "One
5 Step at a Time."

6 A Yes, but you would expect that if he was
7 to put out another studio album at that time, it would
8 have -- he was on a down-trend at the time. And this
9 is sort of reversed because the sales of "Always
10 Never," "The Latest Greatest Hits" was -- was now
11 going back in the opposite direction.

12 Q Would you consider that a significant
13 change, the greatest hits sales, as opposed to the
14 "Always Never the Same" sales?

15 A I think it was because you -- you have to
16 look at the combination of the greatest hits and then
17 the album of George Strait that appeared pretty much
18 close to the same time frame.

19 And if you looked at the two of them
20 together and just in the time line as when these were
21 happening, and from the point of view of the record
22 company, you suddenly saw a resurgence of George

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1 Strait.

2 Q So, the resurgence is going from about a
3 million sales to about 1.2 or one and a quarter
4 million sales?

5 A Or if you add the two together -- they
6 came out pretty much simultaneously -- it's up to over
7 two million.

8 Q Which two that came out almost
9 simultaneously?

10 A "Latest Greatest Hits" and "George
11 Strait".

12 Q Okay, so if you added together also the
13 "Always Never the Same," "Merry Christmas Wherever You
14 Are," and "Christmas," which seem to have all come out
15 in 1999, that would probably be about equal, wouldn't
16 it?

17 A Well, it wouldn't be equal certainly to
18 adding those two together. And as I said -- as you've
19 pointed out, it's probably unfair to use something
20 like a Christmas album as -- as a basis in that.

21 Q Okay, any others we should hit before
22 Reba?

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1 A No.

2 Q Oh, by the way, as an Eric Clapton fan, I
3 believe Judge Van Loon is right that "Riding with the
4 King" is not on his chart. But "Crossroads 2" is a
5 greatest hits collection and also appears not to be on
6 the Eric Clapton chart. It's a 1996 release.

7 A I'd have to see why.

8 Q That's all right; we can just go on to
9 Reba.

10 CHAIRMAN VAN LOON: What chart number is
11 that?

12 MR. NEWBERG: Reba McIntyre, Chart Ten.

13 BY MR. NEWBERG:

14 Q Now, I believe in your testimony, you
15 point to Reba McIntyre to make two points: one, to
16 show an example where a new studio -- studio album did
17 significantly better than the studio albums before it,
18 thus reversing a trend; and two, to show an example
19 where a hits compilation did significantly better than
20 the studio albums preceding and subsequent to it. Is
21 that correct?

22 A Yes.

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1 Q And could you tell us what you were
2 looking at when you made that statement in your
3 testimony?

4 A Well, the Volume II of the "Greatest Hits"
5 in 1993 sold significantly more than her previous
6 studio albums of even, you know, "For My Broken Heart"
7 and "It's Your Call".

8 Q What about "Forever in Your Eyes"?

9 A That's obviously a very low selling album.
10 I'm not sure exactly what was on it. But if you look
11 at that, then it's even more significant.

12 Q Do you happen to know whether "Forever in
13 Your Eyes" is actually like "Greatest Hits," a hits
14 compilation?

15 A I'm not sure of what was on it, but I was
16 looking more at the "For My Broken Heart" and "It's
17 Your Call".

18 Q And you decided to not look at "Forever in
19 Your Eyes" just because it was so small?

20 A Yes, and I'm looking for trends. I'm not
21 looking for individual situations. Here is an example
22 of a greatest hits that -- that sold significantly

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1 better.

2 Q If "Forever in Your Eyes" was a hits
3 compilation -- let's just assume for now that it was
4 -- could you explain why that might do so poorly,
5 while the "Greatest Hits, Volume II," which was
6 released right after it, did so well?

7 A I would have to go back and look and see
8 what was on it, whether it was really sold to all
9 stores, whether it was -- how it was promoted,
10 etcetera.

11 Q And what about the point where you were
12 showing a new studio album did significantly better
13 than the studio album before it?

14 A We were looking at "Starting Over" there,
15 I believe.

16 MR. JACOBY: What?

17 MR. NEWBERG: In his testimony, he points
18 to Reba McIntyre as an example where a new studio
19 album does significantly better than the albums
20 preceding it, reversing a trend.

21 ARBITRATOR VON KANN: What page is that,
22 Mr. Newberg?

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1 MR. NEWBERG: In fact, I believe he points
2 to "Starting Over" specifically --

3 ARBITRATOR VON KANN: Is that paragraph
4 seven?

5 MR. NEWBERG: -- which was paragraph
6 seven.

7 MR. JACOBY: It was paragraph seven.

8 MR. NEWBERG: Yes, paragraph seven.

9 MR. JACOBY: Okay, go ahead.

10 THE WITNESS: I assume they were looking
11 at "Oklahoma Girl".

12 THE COURT REPORTER: Mr. Fine, you're
13 going to have to speak up.

14 THE WITNESS: I assume they were looking
15 at "Oklahoma Girl".

16 BY MR. NEWBERG:

17 Q Okay, my first question is, do you happen
18 to know what songs were on "Starting Over"?

19 A No, I do not.

20 Q I'd like to hand something out as RIAA
21 Exhibit No. 111 DPX -- RPX, excuse me. If you would
22 take a look at "Starting Over" and look at the track

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1 list?

2 A Yes?

3 (Whereupon, the above-
4 referenced document was marked
5 as RIAA Exhibit No. 111 RPX for
6 purposes of identification.)

7 BY MR. NEWBERG:

8 Q Do you recognize any of those songs?

9 A I don't.

10 Q Do you know Linda Rondstat's "You're No
11 Good" or the Romantics' "Talking in Your Sleep" or
12 "Please Come to Boston"?

13 A Obviously, "Please Come to Boston," I've
14 heard the title. But I -- I'm not familiar with the
15 other songs on this album.

16 Q Do you know if it's possible that this
17 album, "Starting Over," was actually simply a cover
18 album that Reba McIntyre did of other people's hits,
19 underlying works?

20 A I guess it's possible. I don't know.

21 Q Would that affect your analysis at all?

22 A Well, if it was a cover album and if I

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1 knew it had been a cover album, then I would not have
2 used this as an example for showing a reversing of a
3 downward trend.

4 Q And albums that was compared to, I guess
5 you skipped "American Legends". That's done because
6 it's a greatest hits --

7 A Obviously.

8 Q -- album. Do you happen to know if
9 "Oklahoma Girl" is also a hits compilation?

10 A I don't know.

11 Q Would it affect your analysis if "Oklahoma
12 Girl" was a hits compilation?

13 A It would have affected -- it would affect
14 it to the extent that this would not be a good example
15 of a reverse trend. But there are other artists here
16 that were better examples of a reverse trend.

17 Q Okay. Then, let's move on to another
18 artist.

19 ARBITRATOR VON KANN: Mr. Newberg, do you
20 have a sense of about how long --

21 MR. NEWBERG: Yes, I have about two more
22 charts -- three more charts, one of which is brief,

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1 and the other two which are the same amount of time
2 that I've been taking on each chart.

3 BY MR. NEWBERG:

4 Q The next one I'd like to look to is U2,
5 Chart 12.

6 A Yes?

7 Q Now, again, you point to U2, Chart 12, as
8 an example where a new studio album did significantly
9 better than the albums before it, thus reversing a
10 trend?

11 A Yes.

12 Q And which album were you looking at there?

13 A "Pop" and also "Zooropa".

14 Q "Zooropa"?

15 A Yes.

16 Q As compared to "All That You Can't Leave
17 Behind"?

18 A Compared to "All That You Can't Leave
19 Behind".

20 Q And you weren't comparing it to the -- to
21 the best-of albums --

22 A No.

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1 Q -- which did significantly worse than "All
2 That You Can't Leave Behind"?

3 A No.

4 Q And you would agree that those are
5 greatest hits compilations?

6 A They're hit compilations.

7 Q And do you see a significant difference
8 between "All That You Can't Leave Behind" and
9 "Zooropa" seven years apart and less than a million
10 copies sold apart?

11 A I see a difference because U2 has -- in
12 the industry, was considered a band that was on their
13 way down. And this album was a -- was considered a
14 resurrection of their career as a new -- as a new --
15 as an up-tick to their career.

16 Q And it wouldn't have anything to do with
17 the fact that they had only released one studio album
18 -- one studio album in the previous seven years?

19 A That may have had some effect on them.

20 Q That people might have been --

21 A Well, I think --

22 Q U2 fans might have been thirsty for a new

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1 studio album?

2 A Well, they might have been, but I also
3 think it depends on the material.

4 Q Okay. We're going to make a big jump here
5 to -- because of the time to Chart 18, the Dave
6 Matthews Band.

7 Here, I believed you point to the album
8 "Recently" as the new studio album that did
9 significantly worse than the previous studio album;
10 thereby, reversing a positive trend. Is that correct?

11 A Yes.

12 Q And your conclusion there was that the
13 public reacted negatively to the underlying musical
14 works; is that correct?

15 A There was a reason -- there would be some
16 reason that "Recently" would sell less, and then other
17 albums they have to have sold more.

18 CHAIRMAN VAN LOON: Mr. Fine, you're going
19 to have to --

20 THE WITNESS: Oh. There would be a reason
21 why "Recently" sold less, and other albums, at least
22 afterwards, sold greater.

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1 BY MR. NEWBERG:

2 Q Did you happen to look at what type of
3 album "Recently" was?

4 A No, I did not.

5 Q Well, here's RIAA Exhibit 112 RPX, which
6 I will note that even though it didn't sell very well
7 in the United States, it's apparently Amazon's sixth
8 most popular seller in Portugal.

9 [Whereupon, Exhibit 112 RPX was
10 marked for evidence]

11 Now, taking a look at 112 RPX, the
12 Amazon.com info sheet for "Recently," do you see there
13 that it is a live album, titled, "Recently Live"?

14 THE WITNESS: Yes, I see the title there.

15 BY MR. NEWBERG:

16 Q And if you go to track listing, do you see
17 that there are only five tracks on the entire album?

18 A They have five tracks here, yes.

19 Q And are you familiar with Dave Matthews
20 Band? Do you know whether any of these tracks
21 appeared on any of his previous albums?

22 A I'm not familiar with him --

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1 Q Familiar with the song --

2 A I'm sorry. I'm not familiar with the Dave
3 Matthews Band. So I'm not sure whether these songs
4 were good on other albums.

5 Q Are you familiar with the song "All Along
6 the Watchtower"?

7 A No.

8 Q Jimi Hendrix or the U2 versions of the
9 song?

10 A No.

11 Q Well, if "Recently" was a live,
12 independently released recording of only five musical
13 works, all of which were works from prior albums or a
14 cover of another artist recording, does that change
15 your analysis at all?

16 A Yes.

17 Q How would it change it?

18 A It would just change -- in this particular
19 case this would not be a good case of what I was
20 pointing to.

21 Q In fact, the four worst sellers on this
22 album, would you agree, are "Remember Two Things,"

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1 "Recently," "Live at Red Rocks," and "Listener
2 Supported"?

3 A Those are the four.

4 Q Is that correct?

5 A Yes.

6 Q Do you happen to know whether all four of
7 those albums are live compilation albums by the Dave
8 Matthews Band?

9 A I don't know.

10 Q If that were the case, and we were to take
11 those albums out, would the remaining albums in the
12 Dave Matthews Band follow your traditional curve of
13 the importance of the artist?

14 A Well, I would say even here that the drop
15 between "Crash" and "Before These Crowded Streets"
16 would be a drop that would be reflective somewhat of
17 different materials, of the value of the materials.
18 That's a significant drop.

19 Q Would you agree that the drop of "Crash"
20 to "Before These Crowded Streets" looks to be about
21 the same as the drop of "Before These Crowded Streets"
22 to the next studio album, "Everyday"?

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1 A No. I think you'd have to say "Crash" is
2 slightly under 5 million; "Before These
3 Crowds," -- what -- three and a half. So you'd
4 probably have about a million-and-a-half. And the
5 difference here is probably, maybe, half of that
6 difference.

7 Q So the difference from "Before These
8 Crowded Streets" to "Everyday" is about 750,000
9 copies.

10 A Six hundred, something like that.

11 Q So you don't think that's a general trend,
12 a general downward trend? You disagree with me on
13 that.

14 A Yeah, I would think that it has -- that
15 the initial change is really due to the material.

16 Q Okay. Let's go on to the last part of the
17 exhibit, the Jimmy Buffet chart, Chart 20.

18 And I believe you point to Jimmy Buffet
19 specifically in your testimony, paragraph 7, saying
20 that, Jimmy Buffet's 'Beach House on the Moon' far
21 exceeded the sales of their most recent prior albums."

22 A Yes.

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1 Q And you'd consider that a successful come
2 back of Jimmy Buffet.

3 A Well, I'm not sure that you'd have to say
4 come back, but it's -- I would certainly attribute
5 that to material that his audience liked, and,
6 therefore, brought more of it than his previous.

7 Q Okay. Are you a Jimmy Buffet fan,
8 Mr. Fine?

9 A No.

10 Q Well, I was hoping you'd say yes, because
11 it would save a lot of time if we can say that half of
12 the albums listed on this chart are re-releases of old
13 Jimmy Buffet albums and "Greatest Hits" and live
14 compilations.

15 If you'll trust me, in the interest of
16 time I have the track listings. I can certainly give
17 them to you. But I count 7 out of the 14 albums on
18 this chart to be new studio albums. That would be
19 both "Speeches, Bores and Ballads," "Fruitcakes,"
20 "Barometer Soup," "Banana Wind," "Christmas Island,"
21 "Don't Stop the Carnival," and "Beach House on the
22 Moon."

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1 Now, if you believe one of those not to be
2 a new studio album or believe that album is a new
3 studio album, please let me know.

4 MR. JACOBY: Objection. That's an
5 improper question. If you want to ask the witness
6 what he knows and doesn't know, that's fine. But you
7 can't prove anything by what he doesn't know.

8 BY MR. NEWBERG:

9 Q Okay. Do you know whether that's an
10 accurate --

11 A I don't.

12 Q This is the chart that you've submitted
13 with your testimony. Did you check over these albums
14 and what they contained in their history before
15 putting it into this chart?

16 A No, I did not.

17 Q Did you check over which albums were
18 studio albums and which albums weren't before you made
19 the conclusion that "Beach House on the Moon" changed
20 a negative trend?

21 A Well, if I hear what you just said, that
22 "Don't Stop the Carnival" was a studio album, then

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1 "Beach House on the Moon" certainly sold significantly
2 better than "Don't Stop the Carnival." And that would
3 just be an indication of the -- again, the material.

4 The important thing in my analysis wasn't
5 to look at individual artists and determine whether
6 they were up trends or down trends, et cetera. It
7 really is the premise that, if the artist is
8 important, then sales should be pretty flat from
9 studio to studio album. And that if the -- and it
10 wouldn't matter by the supposition that the material
11 doesn't matter, then you should really be up there.
12 The fact that you had ups and down, even if they're
13 not big ups and downs, just the fact that they go up
14 and down would indicate that those ups and downs are
15 caused by the material.

16 Q Now, did I just hear you incorrectly or
17 did you just say that if it was just the artist, you
18 would see it being flat? I thought before you were
19 saying a bell curve or a trapezoid.

20 A Well, it would be flat to the extent once
21 you reach the level of popularity, you would stay
22 there. Obviously, your first album is not going to

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1 be -- when you're a new artist you're not going to be
2 at the top of the trapezoids. So you're going to get
3 up there, and you're going to stay there for a period
4 of time, and then you're going to come down. And when
5 you see ups and downs -- I mean, even little ups and
6 downs here from "Fruitcakes" to "Barometer," which
7 is -- and in this case, the numbers, of course -- the
8 scale is different. It's 900,000 down to 780,000,
9 back to 900,000, down to 800,000, down to 300,000,
10 back to 700,000. I would say that those are ups and
11 downs, of course, are by the material that Jimmy
12 Buffet is singing. Because if it was just Jimmy
13 Buffet and he can sing anything, you'd expect this
14 thing to be fairly level.

15 Q So getting back to the question I threw at
16 you about an hour ago, which was, if the artist was
17 80 percent important and the underlying musical work
18 was 20 percent important, wouldn't you see these 750
19 to 800s, 900s, 800?

20 A I think you'd see some stuff like 700 to
21 750 -- that -- but you wouldn't see drops that go as
22 far down as a lot of these drops go down.

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1 Q Now correct me if I'm wrong. So to get a
2 100,000 album change here, you'd have to assume that
3 the musical work was at least as important as the
4 artist?

5 A No, I can't put a value to it. But here,
6 if you look at "Don't Stop the Carnival" and look at
7 "Beach House" and the previous one, I guess "Christmas
8 Island," you're going from 800,000 to under 400,000,
9 which is a 50 percent decline. Let's look at it that
10 way.

11 Q Okay.

12 A And then a jump of 400,000 to 700,000,
13 it's 75 percent better than that. Those kinds of
14 jumps, the material has to be more than a minor
15 effect.

16 Q Okay. Would you agree with me that
17 outside "Don't Stop the Carnival," that all six of the
18 other albums -- studio albums -- went anywhere from
19 700,000 to 900,000 albums sold over this decade time
20 period?

21 A That's what this says, yes.

22 Q Right. And "Beach House on the Moon"

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1 would actually be the worst of those six.

2 A Excluding "Don't Stop the Carnival"?

3 Q Right.

4 A It would be the worst of them.

5 Q Excluding "Don't Stop the Carnival," of
6 course --

7 A That's correct.

8 Q -- which you've said that would be what
9 you'd compare it to.

10 Do you happen to know what the material is
11 on the album "Don't Stop the Carnival"?

12 A No. But I would also looking at this
13 point out that the drop from "Fruitcakes" to
14 "Barometer" would be an indication of the material
15 too, because you would have expected -- if it then
16 bounces back afterwards, 120,000 change on 900,000 is
17 a significant drop.

18 Q Does it have anything to do with something
19 you were saying before, that these albums are so close
20 to each other?

21 A Well, but it won't explain why the next
22 one that's so close -- "Banana Wind" -- suddenly goes

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1 back up. I think it's the material that causes the
2 albums to go down and go back up.

3 Q Which one are you talking about that goes
4 back up?

5 A "Banana Wind" versus "Barometer."

6 Q Okay. And just to follow up on my
7 question about "Don't Stop the Carnival," doesn't that
8 strike you significantly lower than the other six
9 studio albums?

10 A Yes.

11 Q Would it surprise you to learn that "Don't
12 Stop the Carnival" was actually a musical written by
13 Jimmy Buffet and Herman Wouk, based on Herman Wouk's
14 novel of the same name?

15 A I don't know.

16 Q If that was the case, would that make
17 "Don't Stop the Carnival" a good album to look at?

18 A Well, it wouldn't be as -- I think it's
19 still reasonable to look at it, because if he's
20 written the songs, and if the songs were all good,
21 people still would have bought it. So I don't think
22 that's a reason not to look at it. I think

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1 you've -- you've skipped over Chart 14, which is a
2 chart that when they want to look at --

3 ARBITRATOR VON KANN: We have to skip over
4 some charts.

5 THE WITNESS: Well, let's just look at one
6 because it's the one of the "Greatest Hits" that, of
7 course, is left out. And I think here's even a
8 clearer situation of what happens with materials. It
9 sort of shows everything.

10 It's a country artist; puts out a
11 reasonable amount of titles. And you have
12 fluctuations up and down and up and down, which,
13 again, I say indicates the acceptance of the words.
14 You also have the "Greatest Hits," which, obviously,
15 sells better than any of the studio albums before it
16 or afterwards. So I think this is a clearer example
17 of the effect of songs. And, again, I'm not trying to
18 say that the artist doesn't matter. I think the point
19 is, they both matter.

20 BY MR. NEWBERG:

21 Q Just a point on the "Greatest Hits," I
22 don't want anyone to think we skipped over any for any

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1 reason but time.

2 MR. JACOBY: Oh, no, we would never assume
3 that.

4 MR. NEWBERG: I can go through them all if
5 you like.

6 "Super Hits," do you know if that's a
7 "Greatest Hits" collection?

8 THE WITNESS: I assume there are
9 some -- it sounds like it is from the "Super Hits."
10 And that particular one did not do well, and I could
11 not tell you why.

12 BY MR. NEWBERG:

13 Q Do you know if greatest hits are
14 considered better than super hits?

15 A No.

16 Q So, based that "Greatest Hits" had more
17 sales than the studio albums and "Super Hits" actually
18 had fewer hits than any of the other studio albums,
19 does that actually tell us anything about greatest
20 hits albums?

21 A Yeah. I think by and large they still
22 sell well, and that the -- and that this particular

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1 album, without knowing exactly about it, there's
2 probably some other reason that this did not do well.

3 Q What might be one of those reasons?

4 A I don't know. It could have been who
5 released it, how it was promoted, et cetera.

6 Q So there are other factors that go into
7 why the sound recording might not do as well.

8 A Yes.

9 Q Any other charts that you'd like me to go
10 over on this exhibit?

11 A No.

12 Q Just the last little question I have on
13 Chart 5, the Celine Dion chart. The four albums that
14 seem to be far below her other albums, the last one is
15 "Volume 1, Collector Series." Would you agree with me
16 that that sounds like hits collection?

17 A It sounds like it, but I'd have to look
18 into it because it may be a box hit or something of
19 that nature. It may not be a single album.

20 Q But you haven't looked into it.

21 A No, I haven't.

22 Q And the other three albums. You wouldn't

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1 point to those to say that certain albums did better
2 or worse than others because of the musical work,
3 would you?

4 A Which three are we talking about?

5 Q The three --

6 A French albums?

7 Q -- French albums.

8 A Yeah. No, I would not.

9 Q Okay. Just making sure.

10 And do you happen to know that on all
11 three of those albums, all of the songs on those
12 albums are entirely in French?

13 A I believe they are.

14 Q And just a couple of questions on one-hit
15 wonders, which you mentioned before. You said when
16 you pick the charts, you just picked a few from
17 memory.

18 A Yes.

19 Q You didn't use any standard criterion.

20 A No.

21 Q And you didn't have any statistical
22 correlation done.

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1 A No.

2 MR. NEWBERG: No further questions.

3 CHAIRMAN VAN LOON: Anything on redirect,
4 Mr. Jacoby?

5 MR. JACOBY: No questions.

6 CHAIRMAN VAN LOON: Do either of the
7 panelists have questions?

8 Then, Mr. Fine, we'd like to thank you for
9 you reappearance, and your charts, and this
10 information. I want to just clarify, the exhibits
11 that you handed up and reviewed and were discussed,
12 they're not offered, correct?

13 MR. NEWBERG: Not offered.

14 CHAIRMAN VAN LOON: Okay. Then am I
15 correct that our next witness is Dr. Murdoch?

16 MR. RICH: May I address that briefly,
17 Mr. Chairman?

18 CHAIRMAN VAN LOON: Certainly.

19 MR. RICH: This morning I learned that I
20 have to attend a funeral in Brooklyn tomorrow at noon
21 unexpectedly. And I need to conduct Mr. Fisher's
22 examination. If there is any concern that if we

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1 follow the sequence of Ms. Murdoch and Mr. Fisher,
2 that he might slip over to tomorrow. Ms. Murdoch and
3 Ms. Leary have agreed, certainly, to sequence it
4 differently, such that we would put Mr. Fisher on
5 directly after lunch.

6 I haven't had a chance to address this
7 with counsel from the other side, yet, either. But
8 everybody's confident we can conclude both today, then
9 we can maintain the sequence; else I would request,
10 assuming the reporter were agreeable, that we simply
11 shift the order of sequence of the two.

12 ARBITRATOR VON KANN: Do you have an
13 estimate on the direct and cross of Dr. Murdoch?

14 MS. LEARY: I'd say about three minutes on
15 direct.

16 MR. GARRETT: I don't think it would be
17 longer than about an hour-and-a-half to two hours.

18 ARBITRATOR VON KANN: Cross?

19 MR. GARRETT: On cross, yes. I'm
20 perfectly amenable to changing the order. I'm doing
21 both of the witnesses, and I'm prepared to do either
22 one of them, however Mr. Rich would prefer.

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1 CHAIRMAN VAN LOON: If you're amenable, I
2 think certainly based on the time estimates from last
3 Wednesday, it could put in doubt whether we would
4 finish them both in today. And we, of course, want to
5 be as accommodating as possible in a funeral
6 situation.

7 MR. RICH: I would propose we would
8 proceed, then, with Professor Fisher right after
9 lunch.

10 CHAIRMAN VAN LOON: Well, we'll adjourn,
11 then, until 1:30, at which time we'll hear from
12 Professor Fisher.

13 (Whereupon, the foregoing matter went off
14 the record from 12:29 p.m. until 1:36 p.m.)

15 CHAIRMAN VAN LOON: Professor Fisher,
16 welcome back. And we're delighted to have you back
17 with us. And we're going to need to ask your
18 indulgence for a couple minutes while we deal with a
19 couple of administrative matters.

20 We have conferred further with the staff
21 of the library. Apparently, the highest level people
22 at the library, right now as we sit here, just started

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1 a meeting about whether to close the library tomorrow.
2 Both the House and the Senate are going to be closed.
3 They apparently discovered some anthrax in the
4 ventilation system in the Hart Senate office building,
5 and they're going to sweep the tunnels that connect
6 the two groups of buildings, and the Capitol, and a
7 few other things.

8 ARBITRATOR VON KANN: Do we know that it's
9 anthrax? I'm not sure we know.

10 CHAIRMAN VAN LOON: Yes.

11 ARBITRATOR VON KANN: We do for sure?
12 Okay. All right.

13 CHAIRMAN VAN LOON: Some of us know.

14 Upon reflection and discussion, the panel
15 realizes that the worst of all worlds would be that
16 they decide tonight to close this building, and we
17 leave here tonight not knowing that. And at that
18 point, no one would be able to get back in tomorrow
19 morning to get their materials to move them to another
20 location. So we would be significantly handicapped,
21 and we would end up, at a minimum, losing part of the
22 day while we were having transition.

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1 Given all that, we are thinking that the
2 prudent thing for us to do, assuming that the space is
3 available, is to follow the lead of the House and the
4 Senate, and plan to move all of our materials
5 certainly for the rest of this week and I guess
6 Monday. But, perhaps, we should just sort of assume
7 for the duration the idea that we fully anticipate
8 that we'll all be back on Monday or Tuesday. But be
9 prepared, essentially, to be able to go forward with
10 our hearing, with everybody having the appropriate
11 materials at hand, in an alternative location if the
12 worst case comes to past.

13 So it would be our inclination to say,
14 assuming that this works physically, that we would
15 alert people for assistance to move boxes and things.
16 Plan to do that at the close of the hearing today and
17 to reconvene tomorrow morning at 9 at Arnold & Porter.

18 Upon reflection and further discussion
19 over lunch and things of that nature, is there reason
20 why we should not proceed in that way or are people
21 completely comfortable with our doing that?

22 MR. GARRETT: Well, just a caveat. I

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1 learned today, earlier, there was an anthrax scare at
2 Arnold & Porter.

3 MR. KIRBY: Oh, they eat it for breakfast.

4 MR. GARRETT: It ultimately turned out to
5 be powdered sugar from a jelly doughnut. But the
6 nerves are not any different there than they are up
7 here. But that aside, there's no problem in having
8 everyone there. I just hope this is not one of these
9 cases where no good deed goes unpunished, because
10 there will probably be some logistical, at least
11 tomorrow morning, just getting everything all set up,
12 or at least I'm warning you of that. But I expect
13 we'll be able to go smoothly meeting at 9.

14 CHAIRMAN VAN LOON: Well, we were
15 thinking -- in fact I said 9. We were thinking it
16 might be appropriate to say we wouldn't start until
17 9:30 or 10, or something to give additional time for
18 adjustment and set up.

19 MR. GARRETT: That's fine.

20 CHAIRMAN VAN LOON: Is this workable as
21 far as everybody on that side of the room?

22 MR. STEINTHAL: It's fine with us, as long

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1 as we know by 4 -- and we will know as of now -- in
2 which we'll be prepared to go through the weekend
3 there. And we'll reassess whether we come back here.

4 ARBITRATOR VON KANN: Do you envision,
5 Mr. Steinthal, basically clearing our everything, so
6 that if in the worst case if we had to stay at
7 Arnold & Porter for the duration, we could do it?

8 MR. STEINTHAL: I haven't thought about
9 that. But I think my judgment would be yes. If we're
10 going to pack up a lot of stuff, it's easier just to
11 take everything than it is to make decisions about
12 what to take and what not to take.

13 ARBITRATOR VON KANN: To me that would be
14 the safest course. We hope we can get back in here
15 soon, but if we can't, we can finish it the other
16 location.

17 MR. STEINTHAL: I think that would be my
18 approach.

19 CHAIRMAN VAN LOON: Okay. And what the
20 library will do is post this on their Web site. And
21 they have some other devices in terms of public
22 notification, because we are a public hearing,

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1 although the public has not been beating down the
2 doors exactly to get in.

3 Well, let's assume, then, that is what we
4 will do. Is there a preference about starting at 9:30
5 versus 10?

6 MR. STEINTHAL: I'd prefer to start at
7 9:30 just to try to keep as much of the day. I mean,
8 we've got a pretty full day. Mr. Fine took a little
9 bit longer I think than was budgeted. So even though
10 we've lost Ms. Morissette for Friday morning, I think
11 we're still pretty aggressive to get everything
12 accomplished by Friday.

13 CHAIRMAN VAN LOON: You could communicate
14 to her that from the point of view of scheduling, she
15 has performed a public service by helping to give us
16 a little bit more leeway on Friday.

17 MR. STEINTHAL: And the question is
18 whether I should seek to have her in next week or
19 simply wait. And that's something I want to take a
20 look at the way the schedule's going. And we were
21 considering waiving on the artists all along in the
22 sense that we'd like to have them here, but,

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1 obviously, in the scheme of things I think that
2 waiving on the artists is going to be a tremendous
3 hardship.

4 CHAIRMAN VAN LOON: We would leave that
5 completely at your discretion. Obviously, we want to
6 hear live from any witness that you think is
7 appropriate for us to hear from live, but it's up to
8 you.

9 We were thinking -- and had a request of
10 the parties -- that the panel also will need to have
11 rebuttal materials moved to Arnold & Porter. We were
12 thinking that if a large number of Sherpas are going
13 to arrive to move a number of boxes, whether if each
14 one of us had a couple --

15 ARBITRATOR VON KANN: Do we get a free
16 ride on your Sherpas?

17 MR. GARRETT: Sure.

18 CHAIRMAN VAN LOON: Is that doable?

19 MS. LEARY: I'm not a Sherpa.

20 CHAIRMAN VAN LOON: We'll exclude
21 Ms. Leary from our request then.

22 Okay. Thank you very much. Let's

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1 consider it done then. 9:30 is when we'll start
2 tomorrow morning at Arnold & Porter, with enormous
3 thanks for your graciousness, Mr. Garrett, in being
4 able to arrange this for us at very short notice.

5 MR. GARRETT: Sure.

6 ARBITRATOR VON KANN: Mr. Garrett, do we
7 need to say -- for purposes of this public notice in
8 case, lo and behold, somebody should show up -- a
9 particular floor at 555 12th Street, or where do they
10 report?

11 MR. GARRETT: When you walk through the
12 doors there will be an escalator that will take you up
13 to the second floor. And there's a reception desk at
14 the second floor, and they'll instruct everybody where
15 to go.

16 CHAIRMAN VAN LOON: Excellent.

17 The other matter that we held over was the
18 question of the sharing of the transcripts and the
19 potential comment by Mr. Marks. We'd like to follow
20 through with your suggestion with regard to the
21 transcript; that you would make a designation of those
22 portions that you would like to share, and submit that

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1 to Seth Greenstein, the counsel for Yahoo. And if
2 there's agreement from him on the things that should
3 be shared, then that would be appropriate to have
4 people look at.

5 With regard to the commenting --

6 ARBITRATOR VON KANN: On that last point,
7 I suppose if there's not agreement, we probably need
8 to have a time when Mr. Greenstein and you could be
9 heard on that together.

10 MR. GARRETT: Well, we'll do our best to
11 agree.

12 CHAIRMAN VAN LOON: Yes. If it needs to
13 come back before us, it would need to be in relatively
14 short order.

15 With regard to the comment, Mr. Garrett,
16 upon reflection, we were thinking, but wanted to
17 inquire specifically -- that the amount of time the
18 witness from Yahoo took was probably not
19 representative of what the others will do. The
20 significance of that particular agreement is,
21 arguably, in a different category from the others. He
22 was represented by counsel, and the others weren't.

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1 And we're thinking that given on the one hand the
2 somewhat unrepresentative status of Yahoo and the
3 Yahoo agreement, balancing that against the potential
4 time, if there were comments on all of the different
5 ones, we're understanding your request to be that
6 Mr. Marks be given an opportunity to comment on
7 portions of the Yahoo testimony as opposed to a
8 broader request to comment on other ones. Is that
9 correct?

10 MR. GARRETT: I think I did confine my
11 requests to Yahoo. And I specifically identified
12 Mr. Marks. And they also want Mr. Kenswil, who is a
13 member of the Negotiating Committee, to comment on it.
14 But I don't think that what he would have to say would
15 be extensive.

16 CHAIRMAN VAN LOON: We're assuming that
17 this is not a complete reopening, sort of redirect
18 testimony; it's strictly in the nature of rebuttal
19 that would be confined to a focused response only to
20 matters relating to that negotiation.

21 MR. GARRETT: Definitely. And I'm only
22 asking for the opportunity to do so. And if we on

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1 review of the transcript don't 'feel a need to do
2 anything further, then, obviously, we're not going to
3 take up the panel's time with that.

4 CHAIRMAN VAN LOON: And if you did have to
5 do it, are you thinking that this would be pretty
6 limited in time?

7 MR. GARRETT: Definitely.

8 CHAIRMAN VAN LOON: And limited would be
9 10 minutes or something?

10 MR. GARRETT: Fifteen Steinthal minutes.

11 MR. STEINTHAL: Yesterday that translates
12 to 15 real minutes.

13 Your Honor, on that issue, there was no
14 testimony from Mr. Mandelbrot about any communications
15 with the RIAA Negotiating Committee or Mr. Kenswil.
16 If we're going to allow some leeway here, it should be
17 limited to that which Mr. Mandelbrot testified to
18 directly, which is communications with Mr. Marks in
19 the negotiation process.

20 So I really don't think the can of worms
21 ought to be open with respect to the Negotiating
22 Committee at this point.

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1 MR. GARRETT: What I would request is
2 that -- maybe this is not an issue that needs to be
3 resolved. I did want to say at this point in time
4 that it was just Mr. Marks, but I'm not asking at this
5 point in time that it be opened up to anyone else. I
6 would like the opportunity to, again, review the
7 transcript, to do it with the client, and then decide
8 what course of action we take here.

9 CHAIRMAN VAN LOON: Well, I think that
10 with a look to those agreed upon limits, the panel is
11 open to it being done that way, with the thought that
12 Mr. Steintal's point is I think very well taken,
13 assuming that, as we've just agreed, this is real
14 rebuttal.

15 I don't recall any mention of Mr. Kenswil
16 or the Negotiating Committee at all in his testimony;
17 that it was really limited to his negotiations and
18 discussions with Mr. Marks. If it turns out that you
19 find upon review of the transcript that fallible
20 memories have overlooked something, then we could
21 reopen that question at that time, I suppose.

22 MR. GARRETT: I understand your position.

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1 MR. STEINTHAL: Could we also have the
2 benefit -- what we've done -- with some sort of
3 designation before Mr. Marks testifies of what these
4 matters of the rebuttal are going to be as opposed to
5 just the Yahoo negotiations? I think we have a right
6 to know, as if we were presented with a direct witness
7 statement, what the specific subject matters are that
8 Mr. Marks is going to address. I don't want it in
9 great detail, but if it's the MFN or whatever it is,
10 I think we're entitled to some sort of subject matter
11 designation of that which Mr. Marks is going to rebut.

12 CHAIRMAN VAN LOON: The panel also would
13 appreciate that kind of --

14 MR. GARRETT: Sure.

15 CHAIRMAN VAN LOON: Similar to the bullet
16 point summaries which you provided earlier about what
17 the comments would be. But this is, obviously, even
18 more focused than that.

19 MR. GARRETT: That's what I was going to
20 suggest, that we provide the same kind of notice that
21 both sides provided when they filed their statements
22 last Friday about rebuttal.

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1 CHAIRMAN VAN LOON: Excellent. Okay.

2 With those weighty matters behind us, we
3 get the pleasure of Professor Fisher's testimony.
4 And, Mr. Rich, will you be conducting some direct
5 initially?

6 MR. RICH: I will. Thank you,
7 Mr. Chairman.
8 Whereupon,

9 WILLIAM FISHER
10 was called as a witness, and, having first been duly
11 sworn, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. RICH:

14 Q Professor Fisher, you have submitted
15 certain rebuttal testimony in aid of the broadcasters,
16 webcasters and background music services case; is that
17 correct?

18 A That's true.

19 Q And what is the subject matter of that
20 rebuttal testimony and summary?

21 A I was asked to and did address three
22 largely unrelated issues. The first concerns what

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1 relevance, if any, the law governing just compensation
2 awards in eminent domain bears on this proceeding.
3 Second issue is, what's the appropriate temporal
4 framework for the panel's deliberations. And the
5 third issue is, how do countries other than the United
6 States determine the license fees that broadcasters
7 must pay, on the one hand, to the owners of copyrights
8 and musical works, and on the other hand, to the
9 owners of copyrights and sound recordings.

10 Q I'm going to ask you to summarize briefly
11 the substance of your written testimony with respect
12 to each of these three areas, beginning with the law
13 of eminent domain.

14 Could you summarize your written testimony
15 concerning how the willing buyer or willing seller
16 criterion has been analyzed in the law of eminent
17 domain?

18 A After the -- this will be a very short
19 piece of legal history. After the American
20 Revolution, the United States Supreme Court gradually,
21 over the course of a full century, undertook the task
22 of refining the meaning of the "takings" clause

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1 contained in the Fifth Amendment. So the principal
2 innovations made by the Supreme Court along this
3 trajectory are, first, defining the amount of
4 compensation that a landowner is due when his property
5 is confiscated as the fair market value of the tract
6 taken. That term, gains in currency during the 19th
7 century is ultimately applied against the states under
8 the auspices of the "due process" clause of the
9 Fourteenth Amendment.

10 Then in the 20th century, beginning with
11 an important Supreme Court case in 1915, the United
12 States Supreme Court clarifies or elaborates the term
13 "fair market value" to be the equivalent of what a
14 willing buyer would pay a willing seller. Beginning
15 with those early 20th century cases, the United States
16 Supreme Court has several times invoked the same
17 language -- the willing buyer/willing seller
18 language -- to give shape to the constitutional
19 requirement of just compensation, and hundreds of
20 lower courts have taken, not surprisingly, the same
21 position.

22 Q And I take it in your written testimony

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1 that you identified several principles associated with
2 the willing buyer/willing seller formulation of fair
3 market value in the eminent domain setting that you
4 believe ultimately has some relevance to this
5 proceeding; is that correct?

6 A That's correct. So the term -- first, the
7 terms, "fair market value" and then "willing
8 buyer/willing seller" are not self-defining. The
9 courts, led by the United States Supreme Court, have
10 given them some gloss. And three such related
11 principles seem especially pertinent for reasons we'll
12 undoubtedly discuss in a minute here.

13 Those related principles are, first, that
14 when the United States and the federal government
15 expropriates land, it is constitutionally required to
16 pay the landowner under this willing buyer/willing
17 seller criterion, enough money to make him whole; to
18 indemnify for his loss but not to enable him to make
19 a profit from the circumstance. The government is now
20 eager to have his land.

21 Second of these related principles is
22 what's known as the "special benefits rule" applied in

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1 the federal courts. Special benefits rule arises most
2 commonly in circumstances in which the government
3 expropriates a portion of a tract of land. Under
4 those conditions it's common for the
5 government -- projects, say, in a simple case,
6 erode -- to confer indirectly some benefits to the
7 landowner in his capacity as the owner of the
8 remaining parcel. Those are known as special benefits
9 when they benefit the tract that's left.

10 Under those circumstances, the federal
11 courts take the position that the Constitution
12 requires that the amount of compensation be the fair
13 market value of the confiscated piece minus the
14 special benefits, the offsetting benefits received by
15 the landowner on the remaining piece.

16 And the third of the related principles is
17 the proposition that the landowner, whose property is
18 confiscated, cannot use in the eminent domain
19 proceeding what's known versely as "strategic value,"
20 "hold out value," which turned out to be other words
21 for market power. Put differently, that the measure
22 of compensation to which he is constitutionally

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1 entitled does not include -- or is not designed to
2 mimic -- the amount of money that you could extract
3 from the government were they bargaining freely.

4 To give one example that may suggest the
5 application of this principle -- and may be helpful
6 when we turn in just a second to the question of
7 recording licenses. Suppose there's a mountain
8 valley. At the bottom of the valley is farmland. At
9 one point the valley narrows. And there's only one
10 landowner who owns the land in the gap.

11 As to other farmers, or purchasers of land
12 for the purposes of housing, the owner of that tract
13 has no market value. Excuse me, has no market power.
14 And the value of the land is determined by much the
15 same factors that would govern the value of all the
16 other tracts in the valley.

17 Now, against this backdrop, suppose that
18 the government comes along and decides to lay out a
19 road up the valley. It has to pass through the
20 property in the narrow section. There is no practical
21 alternative. If the government were obliged to
22 negotiate freely with the landowners, the person who

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1 owns, has the strategic position, could and likely
2 would extract a substantial premium because of his
3 strategic position.

4 The essence of this related principle is
5 to prevent the landowner from capitalizing on his
6 market power under the circumstances. He's entitled
7 to recover the market value of his property as do
8 other kinds of purchasers, not to capitalize on the
9 strategic position he happens to be in vis a vis the
10 covenant.

11 ARBITRATOR VON KANN: How is that
12 different than the first principle?

13 THE WITNESS: It's very close to the first
14 principle. That's one of the reasons why I described
15 them as related. And when we come actually to the
16 webcasters I mean to state that even more strongly.
17 They converge upon a particular measure of the
18 covenant.

19 BY MR. RICH:

20 Q Now, the law of eminent domain, of course,
21 is developed in the context of real property. And
22 we're here involved in the ethereal world of

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1 intellectual property. Why is it, nonetheless, that
2 you believe this body of doctrine, this body of law,
3 has relevance to the proceedings here, and as a
4 corollary how do you compare its relevance to the
5 Georgia Pacific line of cases about which there's been
6 significant testimony?

7 A There are two reasons why I think it's
8 especially appropriate here and more relative to the
9 panel's deliberations than the Georgia Pacific line of
10 cases. Pause to say, I don't mean to suggest that the
11 Georgia Pacific line of cases is irrelevant. On the
12 contrary, I think it's pertinent to pay attention to
13 those cases. But this eminent domain doctrine is I
14 think somewhat counterintuitively more relevant,
15 counterintuitively because, as Mr. Rich indicates, it
16 does involve real property, not intellectual property.

17 So here are the two reasons. First, this
18 doctrine is old, highly visible and shaped by the
19 United States Supreme Court. It's been developed at
20 least since 1915. And as the main doctrine, it's
21 taught in most first-year property classes. So most
22 lawyers are familiar, at least in broad outlines with

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1 it, and the Supreme Court has shaped it in large part.

2 For those reasons, if -- significant
3 if -- Congress had any particular doctrine in mind by
4 way of analogy when it selected the willing
5 buyer/willing seller criterion, it's more likely to
6 have been this body of material than the Georgia
7 Pacific cases.

8 The second circumstance is that in an
9 important respect, the eminent domain doctrine is
10 different from Georgia Pacific line of cases. The
11 Georgia Pacific decisions all -- or almost
12 all -- arise in circumstances in which a defendant has
13 been found to have engaged in patent infringement.
14 And the court is, in the absence of proof of lost
15 profits, trying to ascertain a reasonable royalty that
16 would have been paid had the parties entered into a
17 voluntary agreement. And the many factors in the
18 Georgia Pacific case are designed to explore that
19 hypothetical question.

20 But because the issue arises in its
21 paradigmatic form in the context of patent infringes
22 damages, it commonly has a punitive cast to it. The

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1 defendant has engaged in patent infringement and
2 unquestionably, socially, undesirable behavior. And
3 so courts, sometimes tacitly and occasionally,
4 explicitly tilt the doctrine in a fashion so as to
5 disadvantage the wrongdoer.

6 By contrast, in the eminent domain area,
7 as the Supreme Court has made clear many times, the
8 task of the courts is to balance two equally important
9 objectives, two equally important, and legitimate
10 objectives. There the two objectives are the
11 legitimate interest in the landowner in not being
12 compelled to forfeit his property without
13 compensation. The principle is embodied in the Fifth
14 Amendment itself. And on the other hand, the
15 legitimate interest of the government standing in the
16 shoes of the public at large and developing public
17 projects. And so, a balance, a delicate difficult
18 balance, between these two is the guiding spirit for
19 the eminent domain cases.

20 The situation before the panel is more
21 similar in this respect to the second than to the
22 first. No one here has engaged in copyright

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1 infringement or other kinds of unquestionably socially
2 undesirable behavior that would trigger an analogously
3 punitive spirit. By contrast, the challenge before
4 the panel is, I think as I suggested at some length in
5 my direct testimony, to serve Congress' goals in the
6 Digital Performance and Sound Recordings Act and the
7 Digital Millennium Copyright Act. And just by way of
8 brief reminder, there are latent in that statute,
9 again, two equally important objectives. First, is to
10 protect the copyright owners against injury as the
11 music industry shifts in the direction of digital
12 dissemination of materials, and the second is to
13 promote the development of the new technologies, and
14 thereby to increase public dissemination of digital
15 music.

16 So analogously, two important legitimate
17 purposes to be balanced. The eminent domain cases are
18 fundamentally similar in that regard. The Georgia
19 Pacific cases are not.

20 Q You proceed in your written direct
21 testimony to suggest several aspects in which the
22 principles you adduce characterizing the law of

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1 eminent domain have relevance in terms of giving
2 guidance to the panel in its own deliberations here.
3 Could you summarize the gist of that testimony?

4 A Yes. So just returning to the three
5 principles and applying them to this context, the
6 first principle reinforces the proposition -- just
7 been advanced by various witnesses including
8 myself -- that the objective of Section 114(f)(2)(b)
9 is to make whole the record companies to ensure that
10 they are, as I say, protected against net injury as
11 the -- as non-interactive webcasting flourishes.

12 That proposition or that goal is quite
13 clear in the legislative history of the Digital
14 Performance and Sound Recordings Act and the DMCA, and
15 it lends further support from the way in which the
16 willing buyer/willing seller criterion is deployed in
17 the context of eminent domain proceedings. So these
18 things fit together, are compatible, in a nice
19 fashion-- a fashion that reinforces the reading of
20 Congress' purpose.

21 The second proposition is the special
22 benefits doctrine developed in the federal courts.

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1 That too finds a parallel in the 114, specifically
2 114(f)(2)(b)(1), which directs the panel when
3 considering -- when setting the appropriate rate to
4 take into account the promotional benefits of
5 webcasting. Promotional benefits are very similar vis
6 a vis the owners of copyrights in sound recordings to
7 the special benefits, the offsetting benefits, secured
8 by a landowner when the government expropriates a
9 portion of his property but confers an advantage on
10 the remainder.

11 The third and last of the implications is
12 the, perhaps, most important. It reinforces the
13 proposition, which has been presented both in my
14 original testimony and in the original testimony of
15 Professor Jaffe, that the willing buyer/willing seller
16 criterion in the context before us should be construed
17 in a fashion that mimics the rates that would be
18 agreed upon by a willing buyer/willing seller in a
19 competitive market-- a market uncontaminated by the
20 exercise of market power. That's the way in which, as
21 I say, the standard is deployed in the eminent domain
22 cases.

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1 There are several other reasons why a
2 similar interpretation of the willing buyer/willing
3 seller criterion should obtain here. They are to
4 briefly review, first, the structure of the statute as
5 a whole, which suggests that non-interactive
6 webcasting should be placed in an economic position
7 intermediate interactive webcasting and radio
8 stations. That's the first proposition. The second
9 proposition is, the legislative history of 114(e) and
10 (f), which were colored by the Justice Department's
11 concern to prevent the record companies from
12 exercising oligopolistic power. Third, the presence
13 in the statutory criterion of the factor that we
14 should take into account the relative contributions of
15 the parties something that's more compatible with a
16 competitive market than a monopolistic market. And
17 finally, the eminent domain cases, which, as I
18 say -- just to repeat for the last time -- have
19 clearly over the course of the century taken the same
20 position vis a vis the meaning of just compensation.

21 There is one last implication of this
22 proposition procedurally, which is that the testimony

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1 that was supplied by Professor Nagle is founded upon
2 the assumption that an appropriate valuation of sound
3 recording licenses would permit the record companies
4 to exercise their market power. More specifically,
5 Mr. Nagle suggests -- observes that accurately that
6 there is no plausible alternative to licenses from the
7 record companies for the webcasters; they have nowhere
8 else to go. And his analysis, for the reasons
9 detailed in my testimony, is explicit in suggesting
10 that under those circumstances the record companies
11 could in an unregulated market extract from the
12 webcasters all of their income and assets, leaving
13 them enough to remain in business and provide them a
14 normal profit. But the basic proposition, which plays
15 out throughout his analysis, is that the record
16 companies could in an unregulated market take
17 everything not necessary to keep the webcasters in
18 business.

19 That's exactly the kind of analysis that
20 the federal courts in the eminent domain context
21 reject. And so comparably here my suggestion is, to
22 the extent Mr. Nagle's valuation of the licenses turn

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1 upon an acceptance of the exercise of market power, it
2 should not be relied upon by the panel.

3 Q Now, Part B of your written rebuttal
4 testimony, beginning on page 13, addresses what you
5 describe as the temporal frame for this proceeding.
6 Could you briefly summarize the issue you there
7 address and your analysis of that issue?

8 ARBITRATOR GULIN: Professor, I'm sorry.
9 Before we go into that, let me make sure I understand
10 a point you make about the eminent domain and its
11 applicability here.

12 I think your point was that, while there
13 may be a willing buyer/willing seller standard for
14 eminent domain as there is for Section 114, in both
15 situations that standard is limited by the concept
16 that the seller is to be made whole and not be
17 permitted to make profits essentially. I want to make
18 sure I understand the implication of this.

19 If we accept the position of the
20 webcasters, which is, essentially, that there is no
21 injury -- as a matter of fact, I think that there's
22 been some testimony that there's a net promotion

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1 effect -- isn't the natural consequence of that, that
2 we should be setting a negative rate that we should
3 require RIAA to pay the webcasters for the use of
4 their music?

5 MR. GARRETT: Will these be monthly
6 payments?

7 ARBITRATOR GULIN: There's some dispute
8 over the terms. But isn't that the natural
9 consequence if we take that analogy to its natural
10 conclusion?

11 THE WITNESS: It's a good, difficult
12 question. So, no, for two I think unrelated reasons,
13 but they may convert. The first, and it might be less
14 fundamental but still significant, reason why the
15 royalty would not come out to be zero is that the
16 statute appropriately contemplates that the panel
17 would make judgments as to risks and not require a
18 demonstration in each instance of proven injury. And
19 so unless the webcasters could establish with
20 certainty the absence of injury, that would suggest a
21 positive royalty.

22 Now -- however, to take this to be

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1 although important to the case, not fundamental to
2 your question -- I think your question goes more to
3 the heart of the matter -- well, assuming there really
4 were no net impact, shouldn't the royalty be zero.
5 And although that's a plausible interpretation,
6 imaginable interpretation of the application of the
7 eminent domain cases to this context, I think a better
8 one, a better way of seeing the implication of that
9 analysis, is to return to the example of the owner of
10 the land in the valley.

11 What the eminent domain cases forbid is
12 the landowner extracting from the government a premium
13 resulting from the fact that he's in this strategic
14 position and the government now needs that land. What
15 it does not forbid -- in fact, what it
16 constitutionally requires -- is that he be paid made
17 whole, meaning paid the fair market value of the land
18 excluding the exercise of that market power. And it
19 has market value. It can be used for farmland, it can
20 be used for housing and so forth.

21 So the implication of the eminent domain
22 cases is not to leave the record companies out in the

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1 cold; it's rather to prevent them from extracting from
2 the webcasters' income that's solely attributable to
3 the circumstance emphasized by Mr. Nagle, namely that
4 there are no alternatives, and, therefore, that the
5 webcasters would in an unregulated market have no
6 choice but to pay whatever the figure the record
7 companies named up to their full assets and operating
8 income.

9 CHAIRMAN VAN LOON: Just picking up on
10 your example. If the narrow neck of the valley is
11 just wide enough for a road and, by coincidence, a
12 strip mall on either side, and that neck happens to be
13 zoned business so that you run this through, and the
14 value of the property otherwise is limited, but now
15 all of a sudden this landowner the unique and the
16 only, let's say, business zoned land, and it's right
17 there on either side; and if under those circumstances
18 the value now of the two parcels that are left exceeds
19 the value of what's going to go to the government, is
20 the landowner paid zero? I'm sure he doesn't pay the
21 government, even in a world of theory.

22 THE WITNESS: There actually is a set of

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1 cases involving the condemnation of easements, not
2 land itself but easements. So imagine -- this may not
3 immediately seem responsive, but it will turn out to
4 be. Imagine that a law firm owns a -- leases,
5 long-term lease. Arnold & Porter has, imagine, a
6 10-year lease. I'm sure this is not true in fact.
7 But has a 10-year lease for a fixed price on a
8 building, and the market falls. And so the law firm
9 is in a disadvantageous position. And the government
10 condemns the building in order to put a new agency
11 there. The law firm benefits under those
12 circumstances because they're released from that
13 lease. They go elsewhere and they can obtain
14 comparable space for less money.

15 And there have been some suggestions
16 exclusively in the academic literature that the right
17 outcome here is to compensate the landowner, the
18 landlord, for the market value of the building plus
19 the premium he enjoys because of the lucrative lease
20 that he has, and to charge the law firm for the
21 benefit they're getting from the expropriation. So
22 that at least some academics have suggested that the

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1 application of these same principles would precisely
2 require charging the parties in, interest. But no
3 court, so far as I know, has ever so held -- it's
4 never been raised as an issue. The only live issue in
5 the literature is whether the landlord gets the
6 premium of the lease or just gets the fair market
7 value of the building. And there's a debate on that
8 question.

9 Okay. So back to your issue. I thought
10 of this and looked for some cases. And so far as I
11 could find -- completely exhaustive search, very large
12 literature. But I was not able to locate any case
13 presenting sharply your issue, where, just to
14 generalize it, the offsetting special benefits exceed
15 the value of the tract taken.

16 One last qualification. Actually, in the
17 17th century in Massachusetts there are such cases,
18 and the landowner gets zero. But that's before the
19 adoption of the Fifth Amendment, before any of this
20 jurisprudence arises. I don't know of any
21 20th century cases that go so far.

22 BY MR. RICH:

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1 Q Following on the panel's questions
2 briefly, coming into the setting of this proceeding,
3 the concept of making the owner -- here, the copyright
4 owner -- whole, do I understand your response,
5 particularly to Judge Gulin, to be that the taking can
6 be thought of as the taking of what would be the
7 competitive market price that might have been obtained
8 as opposed to viewing the taking as whatever, per
9 Dr. Nagle, a monopoly seller might have been able to
10 acquire? Is that the nature of the distinction you
11 were drawing?

12 A Yes, .

13 ARBITRATOR VON KANN: Can I just ask one
14 in the same area? I think a lot of what you say makes
15 a great deal of sense. I'm not sure I disagree with
16 much of the specifics. But I have some difficulty
17 with riding too heavily on the eminent domain model
18 for the following reasons. Two reasons. One is, it
19 seems to me that it is, as with all constitutional
20 documents, stating a constitutional minimum that the
21 government must adhere to. It doesn't mean that
22 people in the free market place may not exceed the

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1 constitutional minimum, for various reasons. And the
2 other complication with it is that is very heavily
3 imbued with a notion of protecting the public trust,
4 the public fisc. A lot of the quotes that you have
5 speak about we don't want to unduly require paying
6 more out the public treasury than necessary. Here we
7 have two private parties, and they don't have the
8 public trust to debit.

9 So my one reservation, although, I'm not
10 sure that I actually disagree with very many of the
11 specifics -- but my one reservation is, isn't the
12 eminent domain law really concerned with,
13 a) constitutional minimums and heavily guarded on not
14 paying out more of the public funds than is necessary,
15 which may not necessarily be the way things work in
16 the marketplace? People sometimes pay more, for one
17 reason or another, more than the government might pay.

18 THE WITNESS: The parallelism actually
19 continues. It's quite common for the government when
20 blowing out a road or any other public project to
21 negotiate with the landowners and to pay an amount,
22 and not to undertake a administrative role in a

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1 judicial proceeding to have the valuation. And the
2 amounts under such circumstances may well be higher
3 than they would be required by the Constitution.

4 So in practice these are similar, and
5 comparably there could be voluntary license in this
6 context. But if the negotiations fail, then, exactly
7 as you put it, the government proceeds and is obliged
8 to pay the constitutional minimum. And it is at that
9 moment that this body of principles, clustered under
10 the heading willing buyer/willing seller, comes to
11 bear.

12 And my sense is that this case is
13 analogous in that sense; that 114 creates an
14 opportunity for free negotiation among the parties.
15 But as a back stop, if they fail to come to terms,
16 sets the level of payment that must be made equal to
17 the willing buyer/willing seller criterion just as the
18 eminent domain cases do.

19 But that -- to observe this parallelism
20 just amplifies your second question-- but aren't they
21 different in a deeper sense? There is, as you rightly
22 point out -- as to my testimony -- the strong theme of

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1 recognition of the importance of the public interest
2 in the eminent domain cases.

3 My sense on that is that, although it's
4 not immediately visible in this particular provision
5 of the copyright statute, the copyright statute, as a
6 whole of which this is a part, is quite similar. Just
7 to return to some basics undoubtedly familiar to all
8 of you, the central justification for copyright law in
9 the United States is the utilitarian one in which it's
10 designed to confer a limited set of entitlements upon
11 creators they wouldn't otherwise enjoy in order to
12 induce them to engage in activities, creative
13 activities, from which the public benefits. And then
14 all of the details of copyright law, both the
15 elaborate arrangement of statutory provisions and the
16 way the courts interpret them, consists of a balancing
17 act. And the global balancing act in the copyright
18 statute is, on the one hand, to ensure that incentives
19 for creativity remain strong, but on the other hand,
20 to ensure that the public has access to intellectual
21 products at reasonable prices and without undue use
22 limitations. And so the fair use doctrine and

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1 copyright law is heavily designed to achieve that, and
2 many of the statutory licenses throughout the
3 copyright statute are similarly designed to strike
4 this balance.

5 So lurking behind Section 114 and the
6 copyright statute as a whole is a conception of the
7 importance of the public interest analogous to the
8 eminent domain cases.

9 BY MR. RICH:

10 Q Let's turn now to Part B of your analysis.
11 And the question which I had begun to pose was, what
12 was the issue or what were the issues you were there
13 addressing and how do you analyze those issues?

14 A So the general question is, how far
15 forward and far back is it appropriate to look when
16 setting the rates in this proceeding. The procedural
17 context as I understand it in which this issue arises
18 is that, at least one witness -- maybe more, but
19 Mr. Nagle at least -- has offered testimony that
20 places some weight upon projections concerning the
21 likely shape of the webcasting industry 5 or 10 years
22 down the road. And at the same time, various

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1 witnesses have offered testimony concerning what
2 people at some time in the past -- two, three, four
3 years back -- were predicting concerning where we
4 would be today.

5 So I was asked to address the question,
6 what insight does the language of the statute's
7 legislative history and its structure cast on the
8 appropriateness of, on the one hand, looking forward
9 and, on the other hand, looking back. And my response
10 in brief is that the principal focus should be on the
11 present. So for that purpose, it's I think more
12 sensible to be in with the statute itself, which
13 specifies that in the absence of voluntary
14 negotiations, the statutory royalty would be reset by
15 successive CARPs every two years.

16 Now, I understand that this particular
17 proceeding is a little bit unusual in that respect
18 because, for purposes of administrative convenience,
19 it consolidates two separate proceedings, one from
20 late 1998 to the end of 2000, and the other from the
21 beginning 2001 to the end of 2002. But the statute,
22 as I suggest in my testimony, seems quite explicit

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1 that in the absence of voluntary negotiations this
2 rate would be reconsidered every two years.

3 So that's an early important, because it's
4 from the statute, indication that we should be looking
5 to the present, but it doesn't exhaust the issue. So
6 the next logical question is, all right, so we're
7 going to set the rate by looking at the present.
8 Should we take into account when doing so the likely
9 trajectory of the webcasting industry into the future?

10 So to answer that I went back to the
11 legislative history, which contains just one piece of
12 information, but it's a crucial, on-point piece of
13 information, indicating that the purpose of the
14 biennial reviews was to create flexibility in light of
15 the fact that the webcasting industry is expected to
16 change dramatically fast. And that objective, the
17 relationship between a short periodic review of the
18 rate and the volatility of the industry, is consistent
19 with the way Congress has dealt with other fields. So
20 my testimony points to a early 1980s D.C. circuit case
21 which makes clear the general idea of the copyright
22 statute is to have long periods of reevaluation in

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1 industries that are relatively stable and short
2 periods in industries that are volatile. So this
3 particular provision in 144 is not anomalous; it's
4 consistent with the way the copyright statute as a
5 whole is set up.

6 So armed with this information, we return
7 to the question, should we take into account long-term
8 future projections when determining the rate for the
9 present. And there would seem to be against this
10 backdrop three considerations why we should not or
11 should give relative little weight to the future
12 projections.

13 The first is that it's hard to do so, as
14 Congress recognized; things are changing fast.
15 Second, it's unnecessary to do so because the biennial
16 reevaluations make possible flexibility and adjustment
17 if things change. And the third is a little less
18 straightforward. The third consideration, points in
19 the same direction, is that our ability to effectively
20 advance the underlying purposes of the statute, which
21 to repeat are to protect the record industry against
22 injury while stimulating the development of the new

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1 technologies, is likely to be maximized if we
2 concentrate on the conditions that exist at the
3 present and not run the risk of unduly constraining
4 the development of the industry now on the basis of
5 anxieties concerning what might happen in the future
6 insofar as if those anxieties come to past it will be
7 easy for successive CARPs to take them into account.

8 So that's my response to the
9 looking-forward question.

10 Q There's also a looking-back component to
11 this; is that correct?

12 A That is correct. So on that issue I recur
13 to the same set of considerations. Should the -- what
14 should be the objectives of the panel; what are the
15 underlying purposes of the statute or provisions as a
16 whole? To state one more time, to balance the
17 protection of the record industry against the
18 promotion of the industry.

19 That would seem to be best served by
20 looking to economic conditions as they exist now
21 rather than relying upon predictions made in the past
22 concerning where we would be now. It's not to say

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1 that predictions made in the past are irrelevant; they
2 should be, seem, consistent with this logic given
3 whatever weight they merit in terms of illuminating
4 the current structure of the webcasting industry, but
5 that they should not trump more recent data. And that
6 inference from the structure of the statute is lent
7 further credibility by the way in which courts
8 administering the Georgia Pacific criteria have taken
9 into account recent developments.

10 In the Georgia Pacific context, was just
11 stated once again, involves ascertaining reasonable
12 royalty rates when the defendant has engaged in patent
13 infringement. The courts, using the now familiar
14 Georgia Pacific factors, attend to economic
15 circumstances as they existed when the parties began
16 their relationship. But if economic circumstances
17 have changed since then and we have more recent data,
18 the courts have been overt in insisting that the more
19 recent data be taken into account. And it would seem
20 a similar result should obtain here.

21 One last circumstance pointing in the same
22 direction is that the direct testimony of at least one

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1 of the witnesses for the record companies suggest that
2 in the free market licensors pursue a similar policy.
3 Licensors there set in their contracts short terms to
4 now allow them to adapt to changing circumstances.
5 And it would seem sensible for this panel to pursue a
6 similar strategy.

7 Q Are you here referring to the testimony of
8 Mr. Wilcox of Sony Music Entertainment as reported at
9 paragraph 27 of your written testimony?

10 A Yes.

11 Q Okay. And the case law which you've just
12 described about taking into account, in fact, changed
13 the circumstances over time are the cases addressed at
14 paragraphs 31 and in notes 39 and 40 of your written
15 testimony?

16 A Yes.

17 Q Let's turn, please, to the third section
18 of your rebuttal testimony, which involves the legal
19 treatment of music licenses in other countries. Could
20 you describe for the panel the nature of the analysis
21 you performed in this area?

22 A Yes. And context is important here. In

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1 the direct portion of this proceeding, Mr. Paul
2 Kempton provided data concerning the way in which 12
3 jurisdictions of the United States set licenses that
4 broadcasters -- commercial radio broadcasters -- must
5 pay to groups of copyright owners, the owners of
6 copyrights and musical works and the owners of
7 copyrights in sound recordings, or as they are known
8 in many systems as phonograms.

9 The relevance of that testimony, as I
10 understand it, is not to suggest that it would be
11 appropriate for this panel to mimic either the legal
12 system of any other country or the rates set by any
13 other country. At least to make such a suggestion
14 plausible you'd have to know a lot more than anybody
15 in this proceeding has supplied-- information
16 concerning parallelisms of the economic systems and
17 the legal systems of the two countries.

18 So the purpose of that testimony, as I
19 understand it, is, to repeat, not to suggest we should
20 incorporate by reference the manner in which any other
21 jurisdiction sets these royalties. It rather has a
22 quite narrow but important probative value. It goes

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1 to the question of what's the relative value of
2 licenses for musical works versus licenses for sound
3 recordings.

4 And I gather, as the positions of the two
5 sides have been deployed, they are quite sharply
6 divided on this issue. The webcasters take the view
7 that licenses for sound recordings are equal to or
8 less in value than licenses for musical works; whereas
9 the -- and here I rely for numerical purposes on the
10 testimony of Professor Jaffe. The principle implicit
11 in the record companies' request is that the licenses
12 for musical works -- excuse me. The licenses for
13 sound recordings are 5 to 20 times more valuable than
14 the licenses for musical works. So the issue is
15 fairly sharply posed. And the significance of
16 Mr. Kempton's data is that it provides one window, one
17 window among many, on that issue, which is the more
18 plausible characterization of the relative value of
19 these entitlements.

20 So the gist of his presentation is that in
21 each of the 12 jurisdictions he surveyed, the headline
22 royalty rates, top-of-the-line rates, payable to

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1 musical works are equal to or greater than the
2 headline rates payable to the owners of copyrights and
3 sound recordings. So the first level of analysis that
4 would seem to support, in a quite straightforward
5 manner, the position taken by the webcasters.
6 However, the salience or probative value of the
7 behavior of each of these jurisdictions, with respect
8 to this issue, does hinge at least a significant part
9 on the question of who is setting these rates and on
10 the basis of what statutory criteria.

11 Ideally, one would want a -- as
12 Mr. Kempton probably put it in -- apples-to-apples
13 comparison. So I was asked to explore that
14 question-- what exactly are the systems employed in
15 these different jurisdictions for setting these two
16 rates? So with that task I plunged into the relevant
17 literature, the broad outlines of which I already knew
18 because of my experience in international copyright
19 law and the music business as a whole, but the details
20 of which required work, and hard work as it turned
21 out. So the provisions are complicated, and in many
22 cases obscure, and time was short. So I spent a fair

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1 amount of time at this and am able now to offer the
2 following slightly more refined characterization of
3 what seems to be the appropriate probative value of
4 Mr. Kempton's testimony.

5 Now, the details are all in the written
6 testimony, and I think it would be unnecessary and
7 inappropriate to march through each of the
8 jurisdictions here for I doubt that we'll have an
9 opportunity to talk about some of them. But for the
10 present purposes I think it's best to do it in summary
11 or schematic form. And that's what this chart is
12 meant to convey.

13 MR. RICH: For the record, the witness is
14 referring to a demonstrative that he has put up on the
15 white board.

16 THE WITNESS: So I, in my written
17 testimony in here, have divided the countries -- 12
18 countries -- into four categories. And the first
19 category behave in a manner that lends strong support
20 to the position taken by the webcasters. Countries in
21 the second category provide significant but less
22 compelling support for the position taken by the

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1 webcasters. Countries in the third category I am
2 unable, at least at this point, to say that they
3 support -- provide significant support for either
4 side. And countries in the fourth category provide
5 support for the position taken here by the record
6 companies concerning the relative value of these
7 entitlements. So as you can see from the chart, there
8 are three countries in the first category, six in the
9 second, three in the third, and none in the fourth.
10 So without marching through the entire scheme, I'll
11 just suggest two cases at opposite ends of the
12 spectrum.

13 The first is Canada where a single
14 tribunal, copyright board, has the jurisdiction to set
15 both rates and made an explicit judgment that they
16 should be set at comparable levels. There's no
17 reason, says the copyright board in Canada, to think
18 one is more valuable than the other. And not
19 surprisingly, that mode of analysis produces an
20 outcome in Canada, as Mr. Kempton informs us, a parity
21 between the two rates. So a apples-to-apples
22 comparison yield result supportive of the webcasters's

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1 position.

2 Now, there's one nuance in Canada that's
3 probably worth highlighting right now, which is unlike
4 the situation, for example, in Australia. The
5 Canadian board when determining these rates
6 exclusively considers and rejects a willing
7 buyer/willing seller criterion; instead, setting the
8 rates at a level that's fair and equitable-- different
9 language certainly. And one might think, well then,
10 isn't Canada not apt here because it's, after all,
11 going off on a substantially different, at least
12 formal, criterion.

13 And if the issue before us were, should we
14 incorporate into the United States the Canadian
15 regime, the answer would surely be yes, it's inept.
16 But that's not the issue. The issue, to repeat, is
17 just what's the relative value in the opinion of the
18 relevant tribunal in Canada of the two entitlements.
19 And so the fact that the standard they use is not a
20 willing buyer/willing seller criterion doesn't
21 undermine, for our purposes, of their judgment that
22 they should be treated equally.

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1 The opposite extreme of this spectrum is
2 Switzerland, which in lots of respects would seem to
3 provide substantial support for the position taken by
4 the webcasters there as is true in Spain. A single
5 administrative tribunal sets both rates or has the
6 power to supervise the setting of both rates. And
7 apparently, as best I can tell from the statutes, the
8 relevant criteria would be similar, and the rates are
9 very different. The rates paid by the owners of
10 copyrights and musical works are much higher than the
11 rates paid to sound recording, the representatives of
12 the owners of copyrights and sound recordings.

13 But the probative value of Switzerland in
14 my view is undermined, quite dramatically undermined,
15 by the presence in the Swiss statutes of a unique,
16 nearly unique, statutory provision which sets
17 different caps on the two rates; respectively
18 10 percent and 3 percent. And the rates that, in
19 fact, emerge in those countries, as specified in
20 Mr. Kempton's testimony, are each 90 percent of the
21 relevant cap, leading me to infer that the best
22 explanation for the inequality of the rates in

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1 Switzerland is not that an administrative tribunal is
2 determining that musical works are three times as
3 valuable as sound recordings but rather the presence
4 of this tightly constraining statutory cap. And for
5 that reason I placed Switzerland in the third box
6 here, a jurisdiction as to which I can't say in
7 fairness it provides significant support for either
8 side. There's no plausible way, in my view, of
9 construing the Swiss data as providing support for the
10 position taken by the record companies that musical
11 works are less valuable than sound recordings, on the
12 other hand, for the reason I identified, nor does it
13 provide support for the position taken here by the
14 webcasters.

15 So to summarize, of the 12 jurisdictions,
16 none provide support for the position on this issue
17 taken by the record companies; nine provide support
18 for the position taken by the webcasters of which
19 three provide strong support and six provide for
20 reasons detailed in my written testimony-- significant
21 but less compelling support. And as to three
22 jurisdictions, I have been unable to provide

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1 significant support for either side.

2 MR. RICH: That concludes our direct
3 examination.

4 CHAIRMAN VAN LOON: We normally break at
5 3, which is 12 minutes from now. Why don't we go
6 ahead and take the break and return.

7 (Whereupon, the foregoing matter went off
8 the record from 2:46 p.m. until 3:06 p.m.)

1 CHAIRMAN VAN LOON: If you'd please
2 proceed then with your cross examination.

3 CROSS EXAMINATION

4 BY MR. GARRETT:

5 Q Good afternoon, Professor Fisher. Welcome
6 back.

7 A Thank you.

8 Q Let me talk first about your testimony on
9 Pages 19 and 38 here, dealing with international
10 issues. You were here when Mr. Kempton testified,
11 were you not?

12 A I don't think so.

13 Q Okay. You've reviewed the transcript of
14 the testimony of Mr. Kempton, correct?

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1 A Yes.

2 Q And you'll recall that when Mr. Kempton
3 was here that the Panel had questions about the
4 standards that were applied in each of the different
5 jurisdictions that he studied.

6 A Yes.

7 Q And as I understand it, part of the reason
8 you're back here is to talk about the standards,
9 correct?

10 A Yes, that's true.

11 Q In order to give the Panel the information
12 that they originally requested, correct?

13 A Correct.

14 Q Now, have you been successful in
15 determining what the standards are that applied in
16 setting sound recording royalty rates in each of the
17 12 jurisdictions Mr. Kempton analyzed?

18 A I've certainly been successful, to the
19 best of my knowledge, in ascertaining the statutory
20 criteria employed in ten of the 12 jurisdictions. As
21 to two of the jurisdictions, as my written testimony
22 indicates, Austria and Italy, I can't say that I have

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1 sufficient information to provide a reliable guide to
2 what the statutory criteria are there.

3 Q Okay. Now, as to Canada, I think you made
4 clear earlier that the criteria that are applied there
5 in setting rates are not a fair market value, correct?

6 A Right.

7 Q It's not a willing buyer/willing seller,
8 correct?

9 A Right.

10 Q And were you thinking there just of the
11 sound recording royalty rate or were you also talking
12 about the musical work royalty rate?

13 A The only issue as to which the relevant
14 tribuna in Canada, so far as I know, was explicit on
15 that issue was the sound recording rate. But given
16 the way their analysis was structured, treating them
17 as equal, I infer that the rates are the same, and
18 neither is a willing buyer/willing seller criteria.

19 Q Okay. Do you know specifically what the
20 standards were for setting the musical work rates in
21 Canada?

22 A No. Only what I infer from the structure

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1 of the Canadian Copyright Board's interpretation of
2 the two.

3 Q And you're certain that it was not a
4 willing buyer/willing seller fair market value test.

5 A Yes, I inferred that from the way in which
6 the Board said its ruling.

7 Q Okay. You haven't found any statutory
8 standard that appears in Canadian law concerning
9 musical works.

10 A No, I have not, but for that matter nor is
11 there an explicit statutory standard that rejects a
12 willing buyer/willing seller standard for the sound
13 recording rate. This was an interpretation of the
14 Copyright Board that took that position.

15 Q Okay. How about Spain? What is the
16 statutory standard for setting the sound recording
17 royalty in Spain?

18 A As I indicate in my testimony, our
19 information -- my information concerning Spain is
20 thinner than is true of Canada or, say, Australia. As
21 best I can tell, the relevant statute does not specify
22 with any precision a particular standard, but they

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1 appear to me, I infer from the absence of alternative
2 specifications, that they're identical.

3 Q When you say, "they are identical," you're
4 referring to thee standards for setting sound
5 recording rates and musical work rates.

6 A Yes.

7 Q And that's something that you infer,
8 correct?

9 A Yes.

10 Q It's not something -- there's not a
11 statutory provision that you can specifically point to
12 that says the standards are the same.

13 A No.

14 Q And do you infer that it's a willing
15 buyer/willing seller test that is used in Spain, or
16 fair market value test?

17 A No, I don't. I don't have any information
18 either way.

19 Q Okay. What about the United Kingdom?
20 What is the statutory standard for setting the sound
21 recording royalty in the United Kingdom?

22 A The United Kingdom has several different

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1 relevant provisions, frustratingly vague.
2 Reasonableness seems to be the standard in the United
3 Kingdom across the board.

4 Q Okay. And is it your understanding that
5 that is the same standard that is used for both
6 musical work rates and sound recording rates?

7 A Yes. Now, some support for this
8 proposition, although I can't say decisive, is
9 provided by a 1993 decision by the Copyright Tribunal
10 which it was asked at one point when setting -- when
11 articulating the factors to be used in setting rates
12 for sound recordings, should the two rates be
13 differentiated? And took the position, not admirably
14 crisply, but roughly speaking, they should be set in
15 the same range and, no, did not suggest any basis on
16 which there would be different statutory criteria
17 applied to the two rates.

18 Q All right. Do they apply the willing
19 buyer/willing seller test or fair market value test in
20 the United Kingdom.

21 A They, as far as I've been able to
22 ascertain, don't explicitly reject it but nor do they

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1 accept it. On my reading of both the statute and, as
2 I say, the relevant administrative tribunal, it's no,
3 I don't think the willing buyer/willing seller
4 standard is there.

5 Q And that administrative decision is in the
6 record of this proceeding, correct?

7 A Correct.

8 ARBITRATOR VON KANN: Mr. Fisher, can you
9 keep your voice up.

10 THE WITNESS: Sorry.

11 BY MR. GARRETT:

12 Q Just to pause for a moment here, on the
13 three countries that you say have strong support for
14 the webcasters -- Canada, Spain and United Kingdom --
15 what we can say is is that each of those jurisdictions
16 musical works are valued more highly than sound
17 recordings when one uses a standard other than fair
18 market value or willing buyer/willing seller; is that
19 fair?

20 A That's fair.

21 Q All right. Let's go to the next column
22 here that you've got. I want to put Australia aside,

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1 because you do say that they use a willing
2 buyer/willing seller standard there, don't you?

3 A They do, yes.

4 Q Okay. I want to talk about that in a
5 minute, but with respect to France, Germany,
6 Netherlands, Norway and Sweden, do they use a fair
7 market value or willing buyer/willing seller standard
8 to set sound recording royalties in any of those
9 countries?

10 A Not so far as I've been able to ascertain.
11 And to the extent I can make inferences as to those
12 five jurisdictions, my answer would be no.

13 Q And let me ask the same question with
14 respect to musical works. In any of those five
15 countries do they use a statute -- is the standard for
16 setting the musical work royalty rate a fair market
17 value or willing buyer/willing seller rate?

18 A As to a few of the jurisdictions, I can
19 say with some confidence no. One of those, for
20 complex reasons detailed in the testimony, is Sweden.
21 But my best sense as to the remainder, the answer is
22 also no.

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1 Q Okay. So, again, if we're looking just at
2 France, Germany, Netherlands, Norway and Sweden, those
3 countries where there is some significant but less
4 compelling support for the webcasters' position, the
5 sound recording is valued less than or equal to the
6 musical work rate when one uses a standard other than
7 fair market value or willing buyer/willing seller.

8 A Yes.

9 Q All right. And on Switzerland, Austria
10 and Italy, were you able to determine what the
11 standard is, or the standards are for setting sound
12 recording royalty rates in those countries?

13 A Well, as I say, as to Italy and Austria,
14 no, I was not. As to Switzerland, yes, it's, for the
15 reasons I suggested a minute ago, similar to Spain in
16 this regard. The reason why I think it has to be
17 placed in this third box is that it has a special
18 statutory provision that seems the best explanation
19 for the rates that were actually set, a better
20 explanation than a judgment by any administrative or
21 other tribunal concerning the relative value of the
22 two licenses.

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1 Q These are legislative determinations that
2 the royalty rate can't exceed certain levels, correct?

3 A Right. Plus, parenthetically, one could
4 argue that, as you point out, it's a legislative
5 determination or one might see in this provision a
6 judgment by the legislature concerning the relative
7 value of the two entitlements. But I have adopted for
8 the purposes here I think a more conservative posture,
9 meaning that lots of things contribute to legislative
10 judgments of that sort, and so I don't extract from
11 the Swiss case support for the webcasters' position.

12 Q Okay. You have used in your oral
13 testimony here today and also in your written
14 testimony the term, "value," correct?

15 A Correct.

16 Q And I just want to make clear it is true
17 that in these jurisdictions certain, quote, "values"
18 may be placed upon the sound recording versus the
19 musical work, but, as I think we've established, it
20 doesn't necessarily mean there's a determination that
21 the fair market value or the value that arise from the
22 application of a willing buyer/willing seller test has

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1 been used to determine that value.

2 A Yes, that's true.

3 Q Okay. Would it be better, do you think,
4 instead of talking about the values that these
5 different jurisdictions have attached to musical works
6 and sound recordings instead we talk about judgments
7 as to how much the two different types of works should
8 receive, pursuant to the applicable criteria in those
9 jurisdictions?

10 A No. I think it's best to characterize
11 them as judgments concerning value. The most explicit
12 of the jurisdictions on this score is Canada where the
13 relevant Tribunal identified as the principle reason
14 for setting the rates at parody, this is a quotation,
15 "There's no reason to believe that the use of sound
16 recordings on radio stations has any greater value
17 than the use of the underlying works." And a similar
18 concept seems to be motivating the other jurisdictions
19 in so far as I was able to gain access to their
20 administrative rulings. And that seems to me a
21 plausible approach.

22 Q Let me ask you: Do you have a copy of the

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1 Australian decision that you reference in your --

2 A I do in my materials over here.

3 Q Would you have an extra copy of that?

4 A Just give me a second, I can go --

5 Q I can give you one, unless you have one
6 you'd rather get that's marked up or --

7 A It is marked up, actually.

8 Q Tell you what, Professor Fisher, while
9 we're getting that decision marked, let me just ask
10 you a few questions about the second portion of your
11 testimony, if I could, all right?

12 A Sure.

13 Q This is concerning the temporal frame; do
14 you recall that testimony?

15 A I do.

16 Q You talked -- I think the bottom line
17 conclusion was that you thought the Panel ought to, in
18 setting the royalty rates here, look at the present,
19 correct?

20 A Yes.

21 Q And my first question is, what do you mean
22 by "present?" Do you mean today, literally? Do you

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1 mean the day they write their decision or the day that
2 we filed our written direct cases or the day that the
3 proceeding was commenced? Do you have a view on that?
4 I suspect you do.

5 A I do, although I don't want to put a great
6 deal of weight on it, because I think it's hard to
7 make an inference from the -- it's certainly very hard
8 to make an inference from the language of the statute.
9 It doesn't address this explicitly, and it's hard to
10 infer an answer from the structure. But, as you know,
11 my sense of the best way in the absence of explicit
12 statutory guidance is to recur to the underlying
13 purposes and the underlying purposes are to repeat to
14 ensure the record companies are not suffering any net
15 injury and at the same time to stimulate the
16 development of the webcasting industry. That would
17 seem to point toward a present that's somewhat more
18 generous in its definition than a particular day --
19 today or the day that the Tribunal issues its ruling.

20 So I was suggesting "present" roughly
21 corresponding to the intervals at which the statute
22 contemplates the resetting of the royalty. It seemed

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1 to have been the judgment of Congress that it's
2 sensible to reassess the character of the webcasting
3 industry every two years, and so a sensible interval
4 would be this two years.

5 Now, I understand that for procedural
6 reasons that, however, is slippery in this proceeding,
7 because there are two different intervals at stake.
8 So this is about as far as my ability to extract
9 guidance from the statute goes.

10 So to summarize in case it's not clear,
11 no, I don't suggest that there's any warranty to the
12 statute with the legislative history for selecting a
13 particular date. A better approach would be a
14 somewhat more generous definition of "the present,"
15 keeping in mind for that purpose is the two-year
16 interval at which the rate is to be reevaluated.

17 Q Okay. Let's see if I can figure this out.
18 Let's focus for a moment on the first of the two
19 periods, and that's November of 1998 through the end
20 of 2000. Do you understand that that's the first
21 period here?

22 A Yes.

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1 Q Should we be looking at evidence of the
2 value -- well, evidence of what a willing buyer and a
3 willing seller would have agreed to during that
4 period, I assume, right?

5 A Yes.

6 Q And in determining --

7 ARBITRATOR VON KANN: Is that a yes?

8 THE WITNESS: Yes, that's a yes, sorry.

9 BY MR. GARRETT:

10 Q And in determining what the willing buyer
11 and the willing seller would have agreed to in that
12 period, should we look at evidence post-December 31,
13 2000?

14 A I've not thought about this before, so
15 I'll give you on the spot my best estimate of an
16 appropriate answer. It would be an appropriate,
17 though not mandatory, reading of the statute to
18 separate the two time periods -- the two rates into
19 two time periods, and for that purpose to concentrate
20 attention for the first time period on economic
21 information available then.

22 Now with an important qualification on

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1 this issue, actually, I do have -- I just said I don't
2 have very firm view on it, but on this one I do, which
3 is it would be inappropriate, for the reasons I've
4 tried to suggest here, to select a particular date in
5 that interval and try to identify what that parties
6 would have agreed to upon that date.

7 The reason why I think that's
8 inappropriate is that it neglects the purposes of the
9 statute as a whole, and it's also inconsistent with
10 the lessons of the Georgia Pacific style of cases,
11 which urge courts in analogous, though not as I say
12 perfectly analogous proceedings, to take account of
13 economic conditions that emerge after the date as to
14 which a hypothetical negotiation might have occurred.

15 Q Well, I mean what do you do if you have
16 evidence that things are going pretty good, there's a
17 lot of optimism in the webcasting industry about their
18 future, say, in late '98 throughout 1999, into mid-
19 2000? And everybody thought that this was like the
20 new Gold Rush. And then beginning in mid-2000 or so,
21 or maybe a little earlier than that, things began to
22 slow down. So the industry began to transform a

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1 little bit. Under that hypothetical, what would the
2 Panel be looking at in the way of this time frame?

3 Let me just ask you this: I mean it's
4 possible, is it not, that depending upon where you
5 decide to look for evidence and in what time period,
6 you could get very different rates, couldn't you?

7 A Yes, you could. And the arbitrariness
8 that would be generated by such an outcome is, I
9 think, significantly mitigated by the procedure
10 suggested by the analogy to the Georgia Pacific cases.
11 The recommendation that you not concentrate
12 exclusively upon the projections the parties were
13 making at a particular moment but take into account
14 economic data that emerges subsequently seems a
15 sensible way of, as I say, reducing the arbitrariness
16 that would arise from selecting a particular date w
17 When the Gold Rush was on or the Gold Rush was off.

18 Now, one more reaction on this front is
19 suppose just to keep things simple, to isolate the
20 issue, there was anonymity on the extraordinary
21 prospects of the industry from late 1998 until the end
22 of the year 2000 and that nobody had doubts concerning

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1 the future of the industry until the second period.
2 Under those circumstances, should the Panel select a
3 high rate for the initial period and a low rate for
4 the second period?

5 Well, concern about the apparent
6 arbitrariness of that outcome would be amplified, in
7 my view, by the fact that it would likely have the
8 effect of frustrating one of the major purposes of the
9 statute, namely it would, certainly if the rate were
10 substantial enough, imperil the survival of a
11 significant portion of the webcasting industry.

12 So this is, like many of the delicate
13 issues unaddressed explicitly in the statute, I think
14 is best examined in light of the overarching purposes.
15 You don't want to select a time frame system that will
16 defeat what the statute is all about. And what the
17 statute is all about, to repeat, is to make sure the
18 record companies are made whole, but on the other hand
19 to ensure that the webcasting industry flourishes.

20 Q All right. So when you say "present," at
21 least for the 1998 to 2000 period, you're not
22 literally talking about 2001. You're talking about

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1 that period 1998 to 2000, correct?

2 A Yes.

3 Q And you talk about Georgia Pacific. I
4 infer from that that you certainly see some relevance
5 from Georgia Pacific in this case here.

6 A I do, yes.

7 Q And you've cited one principle from
8 Georgia Pacific that you think has particular
9 relevance, correct?

10 A Yes.

11 Q And would it be fair to say that there is
12 some controversy among the courts about that
13 particular principle? That's not uniformly applied
14 that you take into account subsequent factors.

15 A I am not aware of any decisions that
16 address the issue and reject the principle.

17 Q Okay. Your understanding of Georgia
18 Pacific is that courts uniformly say we're going to
19 determine what the parties would have agreed to at the
20 beginning of the period here but take into account
21 subsequently obtained information, correct?

22 A Yes. My understanding of the relevant

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1 case law is that -- if I can be precise on one point
2 here -- is that the doctrinal category is not Georgia
3 Pacific. The doctrinal category is setting reasonable
4 royalty rates in patent infringement litigation. The
5 reason why that's important is because the lead
6 decision in this area was decided well before the
7 Georgia Pacific case. So this is not an elaboration
8 of the Georgia Pacific doctrine per se, although some
9 of the later cases addressing the issue do meld the
10 Georgia Pacific criteria with this issue.

11 So with that frame work set, my
12 understanding of the relevant case law is that when an
13 issue arises, should we take into account data that
14 became available after the date as to which the
15 hypothetical negotiation would have occurred, courts
16 consistently accepted.

17 Q Okay. Now, let me focus on the second of
18 the two periods here, that dealing with the years 2001
19 and 2002.

20 ARBITRATOR GULIN: Before we do that, let
21 me ask you this, Professor: Would another way of
22 saying that, another way of framing that issue be that

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1 the trier of fact should presume that the parties in
2 this hypothetical negotiation would have had accurate
3 information even if in fact they didn't? In other
4 words, is that a presumption that should be made in
5 trying to construct a rate now after the fact?

6 THE WITNESS: Yes. In fact, that's -- it
7 is in just those terms that at least one of the courts
8 explained this principle. Yes, it's just the way you
9 put it.

10 ARBITRATOR GULIN: And you feel there's no
11 -- Mr. Garrett seems to feel there's some controversy
12 over that, that there's some division of opinion.

13 THE WITNESS: Yes, but not to knowledge.

14 ARBITRATOR GULIN: And you feel there
15 isn't.

16 THE WITNESS: Right.

17 ARBITRATOR GULIN: Okay.

18 BY MR. GARRETT:

19 Q Now, for the second period here dealing
20 with years 2001 and 2002, will you apply the same
21 principles that you just articulated here?

22 A Yes.

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1 Q It's a little bit different situation,
2 because 2002 hasn't even commenced yet, correct?

3 A Yes, it's true.

4 Q So in this particular case, the Panel
5 should be looking at what the willing buyer and the
6 willing seller would have agreed to at the outset of
7 2001, taking account of knowledge gained through some
8 subsequent date here, correct?

9 A Correct.

10 Q And what is that subsequent date?

11 A Well, I don't think the statute and the
12 argument I've suggested outlined here suggests any
13 particular date. There wouldn't be a cutoff. Now,
14 for procedural reasons, meaning the importance of
15 allowing data on this important question to be
16 adequately scrutinized by the parties, it may be
17 appropriate to cut off the time as of the termination
18 of I guess the rebuttal phase of this proceeding. But
19 there does not seem to be any reason in the logic of
20 the statute to close off information as of a
21 particular moment.

22 Q All right. You're not suggesting, though,

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1 that we would take into account the projections
2 through the year 2002, are you?

3 A No. Actually, it would seem to me -- I'm
4 sorry if I misspoke in this regard. When I was
5 suggesting that it would be unnecessary, and given the
6 statutory language inappropriate, to take into account
7 long-term projections, five or ten years down the
8 road, I did not mean to suggest that it would be
9 inappropriate to take into account projections through
10 the end of the period contemplated by the statute. On
11 the contrary, that would seem to me sensible.

12 Q Now, you also referred to some testimony
13 given by Mr. Wilcox in this proceeding; do you recall
14 that?

15 A I do, yes.

16 Q What is the significance of his testimony,
17 in your mind?

18 A The significance of his testimony is only,
19 but not trivially, to suggest that private actors in
20 loosely analogous positions make similar judgements
21 concerning the appropriateness of preserving
22 flexibility by selecting short license terms that will

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1 enable them to readjust their economic relations and
2 more specifically the license rate if and when
3 conditions change.

4 Q So that marketplace evidence there
5 supports the view that you're articulating here.

6 A Yes. Not in the sense that rates agreed
7 upon are pertinent. For that, there's a whole other
8 literature. I gather this is one of the main issues
9 that is contested in this proceeding. But for the
10 purpose of suggesting that it's, I guess the bottom
11 line, wise and sensible to adopt this approach, and
12 Congress' wisdom on this score is reinforced by the
13 fact that private parties when they confront analogous
14 difficulties do the same thing.

15 Q What if the record shows that private
16 parties when they confront an analogous thing do in
17 fact look to projections? Say they do look at
18 projections going out three or four years in
19 determining what the rate should be. Is that
20 something that the Panel should ignore here?

21 A Well, there's one difference in that
22 context from the one we were just discussing involving

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1 Mr. Wilcox's testimony. The difference is that a
2 private party would have a reason for taking into
3 account future trajectories here that the Panel does
4 not, which is there's a disadvantage to the private
5 party to be regularly reassessing the rates. And so
6 there's an offsetting circumstance that would tilt in
7 favor of longer-term projections for a private party.
8 Not so here because the statute mandates a biannual
9 review. And so the relevance of the analogy is weaker
10 in that context.

11 Q Well, but you point out from Mr. Wilcox's
12 testimony that they have this shorter time period that
13 you believe is established in the marketplace. Assume
14 we couple that evidence with further evidence that
15 even in setting those shorter time periods and
16 licenses projections are still made. That's the way
17 the marketplace operates. Is that something the Panel
18 you think should ignore in this proceeding?

19 A Perhaps. Now, here's a separate worry on
20 this score. It relates to one of the major themes of
21 the other part of my testimony, which I'm sure we'll
22 get to sooner or later, namely the market power issue.

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1 Q You have all the power here.

2 A We'll see. It may be helpful for these
3 purposes to refer at least roughly to the testimony of
4 Mr. Nagle. As I recall, one of his suggestions was
5 that in loosely analogous positions he and his firm
6 counsel private clients to make projections into the
7 future, estimating the shape of the industry five or
8 ten years down the road. Because maximizing revenues
9 will be achieved by setting the rates in the present
10 so as to accelerate consolidation of the industry into
11 a relatively few number of players, which together
12 will be able to generate more revenues than a less
13 consolidated industry down the road.

14 Now, that's a tactic that's one
15 manifestation of the exercise of market power. That's
16 one of the things a monopolist can do is take the
17 long-term view of that sort and set rates in the
18 present, not on the basis of marginal cost but on the
19 basis of an effort to shape the industry in a
20 particular direction so as to maximize profits,
21 ultimately.

22 That's the kind of analysis that might

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1 underlie, as you suggest, the willingness of people in
2 an unregulated market to project into the future. And
3 it's exactly that kind of analysis that I'm suggesting
4 here, as is Professor Jaffe suggesting here, is
5 inappropriate; in fact, it's one of the purposes of
6 114(f)(2)(b), to prevent precisely that kind of
7 calculus.

8 Q Well, what if the evidence shows that
9 those who don't have market power, individual record
10 companies, for example, still have relatively short
11 terms for their licenses and in setting the royalty
12 rates do make certain projections into the future. Is
13 it inappropriate under those circumstances to take
14 that -- is it inappropriate for the Panel to take
15 those circumstances into account in setting royalty
16 rates here?

17 A No, I don't think it would be
18 inappropriate. A different way of putting it is
19 whereas my initial invocation of Mr. Wilcox's
20 testimony suggested that it reinforces the wisdom of
21 Congress in concentrating on short-term purposes, a
22 pattern of the sort you describe, once purged of the

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1 circumstances that I suggest are illegitimate factors,
2 would suggest that Congress was not quite so wise. So
3 under these conditions, what should one do?

4 Q I think it's clear.

5 (Laughter.)

6 I'm sorry, I didn't mean to interrupt. Go
7 ahead and finish, please.

8 A No, I think the issues are posed directly
9 enough. My initial guidance is the structure of the
10 statutory scheme and my reference at the end of my
11 analysis to Mr. Wilcox is meant to reinforce the
12 inferences to be derived from the statutory scheme.
13 You suggest that in some analogous circumstances that
14 the behavior of private actors may deviate from what
15 Congress -- the arrangement Congress set up. Under
16 those conditions, my answer is that one should still
17 pay closest attention to the statutory scheme, but
18 perhaps one comfort level in doing so is likely
19 diminished by the fact that private actors sometimes
20 behave differently.

21 Q Well, when we look at the statutory
22 scheme, it not only has the two-year periods, but it

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1 has the willing buyer/willing seller test, correct?

2 A Yes, that's true.

3 Q So I mean the Panel's function here is to
4 determine what a willing buyer and a willing seller
5 would have agreed to, correct?

6 A Well, with at least one obvious
7 limitation, namely if one imagined willing
8 buyers/willing sellers under these circumstances would
9 agree to five-year contracts, then, no, that's not
10 what the statute contemplates. The statute
11 contemplates setting, in effect, two-year contracts.

12 Q Incidentally, I had a question I wanted to
13 ask you. When you set out in your section on eminent
14 domain, you show how the test was initially
15 articulated on Page 4, in Paragraph 6, down at the
16 bottom. You said, "It's usually said that market
17 value is what a willing buyer would pay in cash to a
18 willing seller." Do you see that?

19 A Yes, I do.

20 Q Then when I look at the statute on Page 47
21 -- I'll just give you a copy of Section 114, and this
22 is the language -- I'm sorry, the willing

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1 buyer/willing seller language is there on Page 47 of
2 what I handed you, correct?

3 A Right.

4 Q It talks about rates and terms that would
5 have been negotiated in the marketplace between a
6 willing buyer and a willing seller. Is there any
7 significance to the words "in the marketplace," which
8 doesn't appear in what you say is the usual
9 formulation of the willing buyer/willing seller test?

10 A Not that I can think of. It's hard to see
11 how -- remember that the backdrop of the willing
12 buyer/willing seller criterion in the eminent domain
13 context is the fair market value test. And when the
14 Supreme Court says what a willing buyer would pay in
15 cash to a willing seller, that's with reference to
16 fair market value. So the use of the term
17 "marketplace" in 114(f)(2)(b) doesn't seem to suggest
18 that Congress meant to differentiate the two contexts.

19 Q Well, you're not suggesting that the term,
20 "in the marketplace," is the surplusage in the
21 statute, are you?

22 A Yes. I'm suggesting it's surplusage.

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1 There's quite a bit of surplusage in the Digital
2 Millennium Copyright Act.

3 Q You don't think that maybe that what
4 Congress was getting at is they wanted the Panel to
5 now focus on the marketplace that's actually developed
6 here, how a willing buyer and a willing seller would
7 act in that actual marketplace as opposed to some
8 hypothetical marketplace?

9 A No, I don't. And this, actually, I have
10 quite, as you know, strong views, meaning that there
11 are multiple aspects of the statute that all point in
12 the opposite direction: the structure of the statute
13 as a whole, the intervention by the Justice
14 Department, the placement of one of the subordinate
15 factors and finally the eminent domain cases. So
16 against that weight it -- the weight of those
17 independent forces are all pointed in a particular
18 direction, I think you'd have to read a great deal
19 into the term "marketplace."

20 Q You refer to a hypothetical, competitive
21 marketplace, correct?

22 A I do.

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1 Q Okay. But even that hypothetical,
2 competitive marketplace will have certain
3 characteristics, certain conditions, certain ways in
4 which people act or don't act, correct?

5 A Yes, that's true.

6 Q And so it's not just enough to just say,
7 "Well, let's have a competitive marketplace." You
8 also need to focus on what those different types of
9 conditions and the way people act and all that. You
10 really need to shape that marketplace, correct?

11 A Yes.

12 Q And would it be inappropriate in doing
13 that to take a look at the way the marketplace has
14 actually developed over the past couple of years?

15 A Well, if it can be done in a fashion that,
16 as I say, purges it of the exercise of market power,
17 no, I don't think it would be inappropriate at all.

18 Q Let me ask you a little bit about your
19 section here on eminent domain. First of all, just as
20 a general matter here, you articulate at least three
21 principles here that you believe have applicability to
22 this proceeding, correct?

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1 A Correct.

2 Q These are three principles of eminent
3 domain law, correct?

4 A Correct.

5 Q Did you understand your task to be to find
6 all of those principles that exist in eminent domain
7 law that may have applicability here?

8 A That may have applicability here, yes.
9 Now, you have to understand -- I'm sure you do
10 understand -- eminent domain law is a gigantic field.
11 It occupies approximately 12 volumes of the Nicholls
12 treatise on the subject, and it has many --

13 Q I've got all 12 of them sitting on my
14 shelf.

15 A I see, I see. Well, it has many
16 dimensions, as you're undoubtedly familiar with now.
17 And so this is by no means a comprehensive map of the
18 law of eminent domain. There are many other aspects
19 of it. These are just the characteristics that seem
20 to be most pertinent to the field here. There are
21 some others we could go into that are cast less
22 dramatic like, but these are, in my view, the three

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1 most relevant.

2 Q I was just wondering, are there any other
3 principles out there that might help me?

4 (Laughter.)

5 These seem to be kind of -- I mean are
6 there other principles -- should I spend the time to
7 research this area to see whether or not there are
8 other principles of eminent domain law that might be
9 applicable to this proceeding?

10 A Well, I could tell you that there is --
11 this is a curious position to be in -- the area that
12 I would look to next if you're not satisfied with
13 these three is the subset of the body of eminent
14 domain pertaining to comparable sales. The reason why
15 that would seem to be relevant is because there is an
16 analogous reference here to comparable voluntary
17 agreements being possibly relevant.

18 I think you will find there, if you peruse
19 the pertinent sections of Nicholls and the related
20 case law, that the grounds on which the courts
21 construe the term "comparable" are very similar to the
22 position offered here by the webcasters.

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1 Q I was asking for things that help me.

2 A I understand, but try it out. Maybe
3 you'll read it some other way. But you see why it's
4 connected even if it doesn't tilt decisively in one
5 direction or other. In the eminent domain context, as
6 here, it is sometimes deemed relevant by the courts to
7 ascertain what other people using similar property in
8 the neighborhood recently have done.

9 Now, there are pretty important
10 constraints, procedure constraints, on it being
11 similar property, the same characteristics recently
12 and in the same neighborhood so that they are truly
13 comparable. And in the absence of comparability
14 evidence as to such sales is excluded. And my view is
15 I guess it's fairest on this tier to offer this as a
16 reason I didn't go into this is it doesn't seem to me
17 to add significantly one way or another to the
18 exploration of the comparable sales question here,
19 because I think they line pretty much exactly.

20 Q Well, but isn't it true, even in the area
21 that you're just referring to, that courts in many
22 cases make adjustments where they don't find things

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1 perfectly comparable?

2 A Yes, they do sometimes make adjustments.

3 Q And, frequently, when a party tries to
4 distinguish something that the other side has offered
5 as comparable and says that it is different, then
6 burden of showing does this difference -- does this
7 distinction make any difference to speak?

8 A Yes.

9 Q Okay. So that might be an area I might
10 want to research, right?

11 A Could be.

12 Q Okay. Anything else you can think of?

13 A Not that I can think of.

14 Q Let me just ask you one about the special
15 benefits that you talk about on Page 6. I took a look
16 at one of the -- actually several of the things that
17 you had cited. This is an article by Ackerman on the
18 effect of special benefits and determining
19 compensation; do you recall that?

20 A I do.

21 Q Would you like a copy?

22 A I doubt it. I remember the article, but

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1 --

2 (Laughter.)

3 Q Sort of the way I felt about it, but it's
4 my job. Well, maybe I can do without it without
5 passing this out as an exhibit here. It says, "The
6 concept of special benefits in condemnation cases is
7 widely known and routinely applied but it is
8 nonetheless confusing." Do you agree with that?

9 A Yes, not as to aspects of it that would be
10 relevant here, but, yes, some features of it, in
11 particular, the edges of the distinction between
12 general and special benefits is confusingly applied.

13 Q Okay. Then he goes on to say, "Simply
14 stated, any analysis of the field of special benefits
15 must begin with the acknowledgement that it is a
16 complex area with a myriad of rules and variations."
17 Would your answer be the same that you would agree but
18 here it seems kind of clear to you?

19 A Yes.

20 Q Then he goes on to quote Nicholls and
21 says, "Upon this subject," referring to the special
22 benefits, "there is a great diversity of opinion and

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1 more rules, different from and inconsistent with each
2 other, have been laid down than upon any other point
3 in the law of eminent domain." Would that be a fair
4 statement again?

5 A Yes. And perhaps I can provide you some
6 examples and suggest why it's such a puzzling field
7 but why the character of those puzzles doesn't need to
8 trouble us here. There are two grounds on which --
9 two main areas in which complications arise. The
10 first, as I indicated, is what's a general benefit and
11 what's a special benefit? So the rough concept is
12 straightforward enough. The rough concept is, to
13 return to our road example, the government lays out a
14 new road in a, to keep it simple, completely rural
15 areas where there weren't roads before. The effect of
16 establishing such a road enhances the market value of
17 all of the land in the general vicinity, because now
18 it's accessible to transportation systems, and it's
19 more suitable for, say, housing and so forth. That's
20 what's known as a general benefit, and that's not
21 taken into account when setting the damage awards.

22 By contrast, if the government, in

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1 building this road, confiscates a portion of a
2 particular tract and that tract receives a distinctive
3 benefit limited to that tract itself, for example, now
4 the owner doesn't have to lay down a private road in
5 order to gain access to the hub lines of the city,
6 that's a special benefit, and that is taken into
7 account. That's the principle but differentiating in
8 practice in much more complex cases what's general and
9 what's specific is very hard, and it's produced a
10 multiplicity of rulings.

11 Now, the reason why that's not critical
12 here is because the analogous offsetting benefit in
13 the webcasting context is the promotional benefit, and
14 the promotional benefit is extremely specific. The
15 promotional benefit arises when a particular song is
16 broadcast or in our case released on a non-interactive
17 webcaster. And what happens under those circumstances
18 -- this is obviously not speaking from my personal
19 knowledge, but from the testimony of people who are in
20 a position to know -- is that demand for that specific
21 song goes up, meaning the demand for CDs containing
22 that specific song go up, because consumers are

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1 exposed to that specific song.

2 In some of the webcasting examples, it's
3 very dramatic in that, not, as you pointed out before,
4 mandatory but it's a matter of custom, there's
5 typically "buy" buttons on the site, and there the
6 promotional benefit to the owner of the copyright in
7 the song recording is direct because you click on the
8 "buy" button, you buy that individual CD.

9 So this very large and confusing body of
10 law concerning what's special and what's general is
11 not necessary for us to explore here, because the
12 promotional benefits are clearly special in character.
13 That's one.

14 The other area that creates a lot of
15 anomaly in this field is that not all jurisdictions
16 adhere to what the Supreme Court has identified as the
17 constitutional minimum. Now, because I've been
18 concerned here with constitutional floor, as
19 articulated by the Supreme Court, I've concentrated on
20 the Supreme Court's minimum and the practice of the
21 federal courts but in a fashion loosely analogous to
22 your suggestion that not everybody sticks to the

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1 constitutional floor. Some states raise the bar above
2 that. And so some states take the position, for
3 example, that when you sever land, you will apply the
4 special benefits rule against the severance, the
5 injuries associated with severance, but not if you
6 confiscate a portion of it. That's a more generous
7 posture than the federal courts supply.

8 Other jurisdictions flip back and forth on
9 this. Oklahoma, for example, recently adopted a
10 referendum. Believe it or not, there was a popular
11 referendum on this issue, and it was then later
12 interpreted in a puzzling manner by the Oklahoma
13 Supreme Court. Those all involve a very complicated
14 body of law contributing to Mr. Ackerman's judgment
15 that it's tricky. But they all involve, as I say,
16 efforts by individual states to set the bar above the
17 constitutional floor. And for the reasons I've
18 suggested here, the venerable, highly visible version
19 of this doctrine is the Supreme Court's juris prudence
20 on the meaning of the Fifth Amendment. That whole
21 literature is unnecessary for our purposes.

22 Q Actually, the particular complexity that

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1 I want to talk about didn't involve either of those
2 two, but thank you for sharing. Mr. Ackerman says
3 that -- he tries to give some just practical
4 guidelines for dealing in this area, and one of the
5 things he says here on Page 107 is, "Consider whether
6 the benefit is caused by the actual public project
7 necessitating the acquisition." Does that make sense
8 to you?

9 A Yes.

10 Q So it's not just enough to say there's
11 some benefit, you've got to link that benefit to the
12 project that -- the particular project, correct?

13 A Correct.

14 Q Now, let me ask you this: Let's assume we
15 have a webcaster who offers two types of services.
16 One is a DMCA-compliant service and the other he has
17 a channel that consists of nothing but songs provided
18 -- sound recordings provided by record labels for the
19 specific purpose of promoting the sale of those sound
20 recordings. That's all done outside the statutory
21 license. Are you with me so far?

22 A Under a contract or license agreement of

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1 some sort.

2 Q Yes, exactly.

3 A Okay.

4 Q So he's got those two types of services,
5 correct?

6 A Correct.

7 Q Now, assume further that one can determine
8 that the DMCA webcasting portion results in the sale
9 of ten sound recordings a month, but the other aspect
10 of this service results in the same of 100 sound
11 recordings a month. Got that so far?

12 A Yes.

13 Q Should the Panel take into account, in
14 setting the royalty rate here, that ten sales or 110
15 sales?

16 A Ten sales.

17 Q Okay. It's pretty clear to you that if
18 there's some aspect of the service that is outside the
19 DMCA and generating promotional value to the record
20 companies that that's not something Congress
21 contemplated in taking into account here under Section
22 114.

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1 A Yes, that's my sense, that the promotional
2 benefit in question is promotional benefit of the
3 activity as to which the statutory license applies.

4 Q Okay. And in the statute, for example,
5 you talked a little while ago about "buy" buttons.

6 A Right.

7 Q But "buy" buttons aren't mandated by the
8 statute, are they?

9 A No.

10 Q If the reason the sales were being made is
11 because of that "buy" button, that's not something
12 that really ought to be taken into account.

13 A No, on that I disagree. Just as you
14 suggested earlier, the way in which the industry has
15 in fact developed is appropriate in calculating the
16 rate. So here a customary characteristic of the
17 industry is appropriate in setting and ascertaining
18 the offsetting promotional benefit. Now, again, this
19 is actually a -- lends further support to Congress'
20 wisdom in selecting biannual reviews, because if the
21 industry custom changes and webcasters who are not
22 obliged to provide buttons withdraw them, and so the

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1 relevant promotional benefit disappears, then it would
2 be appropriate to increase the royalty rate. But just
3 because the webcasters are not currently obliged to
4 provide a service that they do in fact supply doesn't
5 seem a reason to ignore the, in fact, promotional
6 benefit they confer.

7 Q Well, what if the evidence shows that some
8 provide it and some don't? What's your guidance under
9 those circumstances?

10 A It's the aggregate effect of the pattern.
11 So if two-thirds provide it and one-third don't, you
12 make an effort to ascertain what the total effect is
13 of the --

14 Q Do you need to know how many actually
15 provide it?

16 A You need to know at least roughly, yes.

17 Q Let me ask you --

18 ARBITRATOR VON KANN: Let me ask you about
19 another way to handle that. What would happen if the
20 Panel were to say, "This is the rate for a service
21 that has no "buy" button, but if you install a "buy"
22 button, the rate is ten percent less or five percent

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1 less." You can buy down your rate by adding a feature
2 that benefits the record company. If we had some way
3 to quantify that, would that be a reasonable way to
4 proceed?

5 THE WITNESS: Yes. Actually, I think that
6 would be a reasonable way to proceed. And I suppose
7 the statutory authority for it would have to lie in a
8 combination of rates and terms, but the statute does
9 empower you to differentiate among groups of
10 webcasters. So it would seem a perfectly appropriate
11 way to differentiate.

12 BY MR. GARRETT:

13 Q Let's talk just a minute about -- eminent
14 domain, as you discuss it in your testimony, refers to
15 taking of real property, correct?

16 A Correct.

17 Q But it is also true, is it not, that the
18 government has eminent domain power to take
19 intellectual property?

20 A Yes, that's true. There's a statutory
21 provision that confirms this authority.

22 Q And that's 28 USC Section 1498, correct?

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1 A Right.

2 Q And Section 1498 essentially says that the
3 government has eminent domain authority to use patents
4 and copyrights, correct?

5 A That's true.

6 Q And it's true, is it not, that when the
7 government exercises that authority, that the patent
8 holder or copyright owner, as the case may be, is
9 entitled to reasonable and entire compensation under
10 Section 1498?

11 A That's true.

12 Q And it's also true, is it not, that under
13 Section 1498 in determining reasonable and entire
14 compensation courts apply the Georgia Pacific test?

15 A They do, but when they do so they
16 frequently recognize that they're applying a set of
17 criteria developed in a different context, and they
18 have to be applied in a different spirit. So, for
19 example, you will find in cases in this subcategory
20 you've identified statements like the following: This
21 is a case that's best analogized to the exercise of
22 the eminent domain power in relation to real property.

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1 And so we should keep in mind when
2 surveying and applying the Georgia Pacific standards
3 that our goal here is to balance two competing
4 purposes and then they recur to the competing purposes
5 I've identified earlier, namely ensure that the
6 patentee is not deprived of value of his invention but
7 simultaneously to ensure that the public is not
8 injured.

9 And in fact some of these cases, at least
10 one I can recall, say explicitly, "The Georgia Pacific
11 factors don't really apply here in their proper form."
12 Then it goes on to review them in their, as I say,
13 modified spirit. The most recent of these, I can't
14 remember the case name now, but it was a 1999 federal
15 claims decision.

16 So the bottom line is, yes, Georgia
17 Pacific standards are applied when the federal
18 government exercises authority to acquire typically a
19 non-exclusive license and a patent. But when those
20 criteria are applied in this special context, they are
21 typically done so in a manner that deviates subtly
22 from their application in the more typical situation

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1 of patent damages.

2 Q Do you think these cases under 1498
3 applying Georgia Pacific might be particularly
4 relevant in this case here?

5 A I think they are more relevant than the
6 general body of Georgia Pacific cases for just the
7 reasons that you seem to be suggesting in your line of
8 questioning, namely that these do not implicate a
9 punitive spirit or purpose as do the more general body
10 of Georgia Pacific cases.

11 Q Your thought was, as I understand your
12 testimony, that Congress probably had in mind adopting
13 the willing buyer/willing seller test eminent domain
14 law, right?

15 A That's put it a little too strongly.
16 There's no indication, as far as I've been able to
17 find, in either the statute or its legislatively
18 history, that Congress was making reference to any
19 analogous field. My suggestion in my testimony and
20 here is that to the extent that the congressmen, most
21 of them lawyers, had anything in mind when they saw
22 the words, "willing buyer/willing seller," it would

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1 have been eminent domain law rather than Georgia
2 Pacific criteria.

3 Q Spoken as a true property professor. When
4 Orrin Hatch introduced the DMCA and the willing
5 buyer/willing seller test, what he was thinking about
6 was eminent domain of real property and not Georgia
7 Pacific.

8 MR. RICH: Object to the form to the
9 extent that purports to characterize the prior answer.

10 MR. GARRETT: I don't object. I don't even
11 need an answer, actually.

12 BY MR. GARRETT:

13 Q I think the only thing that I wanted to
14 get back to is that I promised -- I just want to -- do
15 we have those Australia exhibits?

16 PARTICIPANT: Yes. Yes, we do.

17 ARBITRATOR VON KANN: Get Ms. Schaeffer
18 back in here to talk about Australia.

19 MR. GARRETT: I'm going to hand out a
20 document that I've marked as 113 RPX.

21 (Whereupon, the above-referred
22 to document was marked as RIAA

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1 Exhibit No. 113 RPX for
2 identification.)

3 CHAIRMAN VAN LOON: Thank you.

4 BY MR. GARRETT:

5 Q I'm going to give you a moment, if you
6 want to look at any aspect of that decision. That is
7 the decision that you reference in your testimony?

8 A It is, yes. Maybe as we go through this
9 if we do it in much detail, it will take me a little
10 bit of time, because the version I have is not the
11 online version. It's a xerox of the relevant -- so
12 the pagination's going to be a little different, but
13 we can manage.

14 Q I'm sorry, I forgot that you had your own
15 copy. I think you had said in your testimony that in
16 setting -- actually, also let me just make clear, all
17 of the countries that you studied, you were studying
18 only the sound recording and musical work rates for
19 conventional over-the-air radio, correct?

20 A Correct.

21 Q You haven't come across any information
22 here about the difference between sound recording

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1 rates, musical work rates in the digital environment.

2 A Well, yes, I did come across such
3 information. I didn't attempt to catalog it, because
4 it seemed to be not relevant here, but, for example,
5 there's an initiative now in Germany to redefine the
6 relevant rates for digital release of these materials.
7 But those -- I think it's just been introduced, the
8 proposition, and it's nowhere near the point of
9 setting an actual rate.

10 Q Okay.

11 A So, no, for these purposes I concentrated,
12 as did Mr. Kempton, on commercial, over-the-air radio.

13 Q Okay. But in your discussion of
14 Australia, you talk about the Australian equivalent of
15 the CARP here, I guess, adopting a willing
16 buyer/willing seller test, correct?

17 A Yes, that's true. Interestingly, however,
18 it's not quite the same willing buyer/willing seller
19 test that I, for one, suggest should be applied, but
20 it is a variant of the willing buyer/willing seller
21 test.

22 Q Okay. How does it vary from the one that

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1 you suggest?

2 A It varies because it accepts the exercise
3 of market power by the relevant Collecting Rights
4 Society on behalf of the sound recording copyright
5 owners.

6 Q There's also a distinction in Australia,
7 is there not, that the statute imposes a cap on the
8 royalty rate that may be set for sound recordings?

9 A It does, yes, at one percent of gross
10 revenues.

11 Q Okay. And so in this particular decision,
12 is it fair to say that what the Copyright Board, the
13 Australian Copyright Board was trying to do is
14 determine what a willing buyer/willing seller would
15 have agreed to as a royalty rate knowing that there's
16 a one percent cap?

17 A That's a subtle, hard-to-answer question.
18 It's not explicit -- the Tribunal is not explicit
19 about that. It seemed to me there are plausible
20 arguments in both directions. So in favor of the
21 characterization you provided, there's the analogy to
22 Switzerland. I'm sure you recall that in the Swiss

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1 case there is a similar cap, actually there are two
2 caps there. And the rate -- both rates bear a
3 relationship to the cap, strongly suggesting that the
4 cap itself is the functional determinant of the rate.
5 And so if you applied that to the Australian analogy,
6 then you would move Australia from this category to
7 this category for the same reason.

8 On the other hand, in Australia, the cap
9 is one percent, and the rate, as reported by Mr.
10 Kempton, is 0.4 of a percent, less than half of the
11 statutory cap. Now, without knowing any more about
12 the inside elements of the negotiation, it seems hard
13 to believe that the cap is the decisive circumstance
14 if the eventual rate is less than half of the cap.

15 Now, as I indicate in my footnote in my
16 testimony, the Collecting Rights Society in Australia
17 in the public news section of its web site takes the
18 position that the cap is, in part, responsible for the
19 rate in question. Now, one could say, well, that's
20 arguably a self-serving proposition in so far as they
21 have an apparent and obvious interest in increasing
22 the rates that they can charge. On the other hand,

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1 it's entitled to some weight, and that's why I include
2 it in my materials.

3 So the ambiguity on this issue, what
4 exactly we make of the cap, is the primary reason why
5 Australia, even though it parallels in many ways the
6 United States, I didn't put here. The primary reason
7 why I didn't is because of the uncertainty, in my
8 mind, concerning just how much downward pressure this
9 cap actually exerted.

10 Q Well, putting aside the cap there for a
11 second, it's true, is it not, that the statute
12 required the Australian Copyright Board to take into
13 account the amount of protected sound recordings that
14 the broadcasters actually use?

15 A Yes. That's a separate issue, also
16 discussed in the testimony.

17 Q And the rate that they adopted was that
18 0.4, approximately, rate, correct?

19 A Correct.

20 Q And is it true, is it not, that the Board
21 also found that about 40 percent of the recordings
22 were protected -- 40 percent of the recordings that

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1 the broadcasters use were protected sound recordings?

2 A Yes.

3 Q Do you think that the fact there were only
4 40 percent of the sound recordings used were protected
5 had some bearing on their setting the rate at 0.4
6 instead of all the way at 0.1?

7 A It's possible. And the use of the
8 identical numbers would support this inference. On
9 the other hand, the statutory language, as I recall
10 it, just sets a cap on the rate. It doesn't say,
11 "Here's a maximum amount," and then discount it on the
12 basis of what portion of the repertoire is protected
13 and what's not. So it would seem to me would have
14 been a plausible interpretation of the combination of
15 provisions to set the rate up closer to the one
16 percent line.

17 Q But one would have to really read -- I'm
18 sorry. Go ahead, I'm sorry.

19 A Just to repeat, I don't mean to suggest
20 here that I can extract from this puzzling combination
21 of circumstances a decisive interpretation of what
22 went on there. And it is, just to repeat, my

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1 uncertainty on precisely this issue is why I didn't
2 promote Australia to a stronger case.

3 Q Okay. Is it a bit more complicated
4 situation here with Australia?

5 A Yes.

6 Q Okay. How long have I been? So I've got
7 another hour to go.

8 (Laughter.)

9 Just give me a minute.

10 CHAIRMAN VAN LOON: Do you have an idea of
11 expected redirect?

12 MR. RICH: I have a very precise estimate
13 at the moment.

14 ARBITRATOR VON KANN: A former colleague
15 of Professor Fisher, named Paul Freund, maybe they
16 weren't colleagues, was once arguing a case in the
17 Supreme Court and after the other side had made a
18 particular disastrous argument, he rose and said, "I'd
19 like to point out a typo on Page 14 in our brief.
20 Here it is. I have nothing further unless the court
21 has any questions." After which Justice Frankfurter
22 supposedly said, "I've heard many fine arguments in

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1 this court, but that's the only perfect argument that
2 I've ever heard."

3 MR. GARRETT: Does this apply in my
4 situation?

5 ARBITRATOR VON KANN: I don't know, we'll
6 see.

7 (Laughter.)

8 MR. RICH: To the reference of disastrous
9 here?

10 MR. GARRETT: You make me think I better
11 ask some more questions.

12 THE WITNESS: He was a colleague,
13 actually, for a very short period of time,
14 unfortunately. He had a large office, appropriately,
15 in a very prominent location in the law school.

16 ARBITRATOR VON KANN: Everything was a
17 complete mess, and he knew where every single thing
18 was in it.

19 THE WITNESS: Exactly.

20 BY MR. GARRETT:

21 Q Well, not to disappoint, thank you very
22 much for your time, Professor Fisher.

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1 A Thank you.

2 CHAIRMAN VAN LOON: And Mr. Rich still?

3 MR. RICH: We still have no redirect.

4 CHAIRMAN VAN LOON: Okay. Do members of
5 the Panel have some questions?

6 ARBITRATOR VON KANN: I have questions in
7 two areas.

8 CHAIRMAN VAN LOON: Let me just ask, sort
9 of looking at this, do you have an estimate?

10 (Laughter.)

11 ARBITRATOR VON KANN: I would think ten
12 minutes or less as a guess. One of the things you
13 said several times, you said again today, was one
14 objective of the DMCA was to make sure that the
15 webcasting industry flourishes, and I'd like to probe
16 that a little bit. You are aware that this is the
17 second CARP proceeding having to do with digital
18 music. There was an earlier one that dealt with the
19 subscription services, correct?

20 THE WITNESS: Correct.

21 ARBITRATOR VON KANN: And they were
22 operating under the 1995 Act, and they had to apply

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1 the standard that appears on Page 145 of your purple
2 book, Section 801(b)(1), I guess --

3 THE WITNESS: Right.

4 ARBITRATOR VON KANN: -- in making the
5 determination, which they explicitly held was not a
6 fair market standard, and the Library and D.C. circuit
7 affirmed, correct?

8 THE WITNESS: Correct. And then in the
9 DMCA, the Congress changed the standard, and we now,
10 this CARP, is bound by the standard on Page 47 that
11 we've looked at several times. Now, in comparing
12 those two standards, I have noted that some of the
13 things in the earlier standard were carried over and
14 some weren't. For example, if you look at
15 801(b)(1)(c), we have almost identical language about
16 the relative creative contributions and technological
17 contributions and capital investment and cost and risk
18 and so on. That's all been carried over to the new
19 standard.

20 But one of the things that was not carried
21 over was 801(b)(1)(d) --

22 CHAIRMAN VAN LOON: Which page?

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1 THE WITNESS: Page 145. Which says that,
2 "to minimize any disruptive impact on the structure of
3 the industries involved and on generally prevailing
4 industry practices," I would have thought that
5 provision is a provision that says to whoever has to
6 carry it out, "Protect these industries. Don't let
7 them get disrupted. We want these industries to
8 flourish and do well." For better or worse, for
9 wisdom or not, Congress dropped that provision in this
10 Section and instead substituted this fair market test.

11 Why should I not read that to say
12 Congress, in effect said, "This time around you've got
13 to let the chips fall where they may. If these
14 webcasters can pay fair market rates and flourish,
15 terrific. If they can't, too bad. You have no
16 obligation to specially protect them, to make sure
17 that they flourish, to insulate them. It's a tough
18 world out there, but we've decided, for better of
19 worse, to remove your special protective mission that
20 we had in the prior section and just let the
21 marketplace determine the outcome."

22 I guess I'm questioning a little bit the

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1 proposition that one of the overarching principles
2 we're supposed to do is to, quote, as you said, "make
3 sure that the webcasting industry flourishes." I
4 would think you'd look at this legislative history and
5 say, "They took that mandate out. They said replicate
6 the marketplace and if the marketplace says this
7 industry should flourish, it will. And if the
8 marketplace says this is not a viable industry, it
9 goes down the tubes, that's what happens in the great
10 American system. Some industries survive, some don't;
11 some flourish, some don't." You no longer have any
12 special protective mission here. You just replicate
13 the marketplace.

14 THE WITNESS: I think that if all one had
15 by way of evidence concerning Congress' intent, that
16 that would be a perfectly fair inference. The reason
17 why I don't draw that inference is because there are
18 many statements in the legislative history of the
19 Digital Millennium Copyright Act reiterating the
20 objective that appears in the legislative history of
21 the Digital Performance and Sound Recordings Act. So
22 that we have independent evidence that the relevant

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1 committees, these are not individual congressmen,
2 understood that that original purpose survived in the
3 DMCA.

4 Now, I've been perhaps inappropriately
5 using shorthand here, so let me try to clarify one
6 point. The legislative history in question, which is
7 referred to in my direct testimony, not the rebuttal
8 testimony, doesn't emphasize just protecting and
9 preserving the webcasting industry, like the oleo-
10 margarine industry or some comparable thing. It's
11 rather that the goal is to foster innovation and
12 development of superior ways of delivering music to
13 consumers. That's what the aspiration was, and that
14 note has been consistent throughout the '90s and near
15 the future -- not near the future, near the present.

16 Now, although I understand this is not an
17 appropriate piece of legislative history, I did
18 provide in the introductory sections of my direct
19 testimony a quotation from Orrin Hatch's, to refer to
20 one of the principal players, recent statements
21 concerning his conception of what ought to be
22 happening in the music industry, which evinces a

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1 continuation of this theme in patience at the absence
2 of development in this area and a desire that it would
3 flourish, to repeat, not just because webcasters are
4 nice people and deserve a break but because it
5 advances the --

6 ARBITRATOR VON KANN: He wants to download
7 his music, as I remember his statement. He's a little
8 miffed that he can't get at more of it at the moment.

9 All right. The other area is this --

10 CHAIRMAN VAN LOON: Could I just ask on
11 that point, is there also, looking at 801(b)(1)(d),
12 minimize any destructive impact on the structure of
13 the industries, in theory, could have been looked at
14 before as trying to ensure there were still lots of
15 little webcasters versus at this point not being
16 concerned if industry consolidation was one of the
17 impacts?

18 THE WITNESS: See, that's harder to answer
19 because it's more specific. To be honest, I would
20 have to go back to the material that I consulted in
21 relation to my direct testimony to see how precise are
22 the indications in the legislative history of the DMCA

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1 on this question; meaning, if I get the question
2 accurately, whether the expressions of enthusiasm had
3 to do with promoting webcasting to advance the public
4 interest or a particular conception of a decentralized
5 webcasting industry. And that, as I say, I'd have to
6 review the materials from a couple months ago to give
7 you a more precise answer.

8 CHAIRMAN VAN LOON: Thank you.

9 ARBITRATOR VON KANN: The second area I
10 wanted to ask about is on Page 18 of your testimony,
11 second full sentence on the page. And it says, more
12 specifically, "To the extent the Panel has evidence
13 showing that things have turned out differently in how
14 the webcasters once thought they would, the Panel
15 should of course rely upon the current data." And you
16 then proceed in the next paragraph to talk about the
17 Georgia Pacific line of cases.

18 Now, I'm going to accuse here of a little
19 bit of inconsistency, recognizing that, as Alexander,
20 quote, told us, "A foolish consistency is the hobgob
21 of little minds." But earlier you told us that you
22 think the eminent domain line is more significant

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1 perhaps than the Georgia Pacific. But when you go to
2 both support that sentence, you do talk about the
3 Georgia Pacific line of cases, and I had the following
4 reaction, which I would like you to comment on.

5 In the Georgia Pacific area, the reason
6 that it is appropriate for the courts to look at
7 current data is they are trying, essentially, to fix
8 damages for patent infringement that has occurred.
9 And there's a large body of law in the damage area
10 that says you avoid windfalls. You don't let people
11 get double recoveries. You figure out what their
12 actual loss is. But if it turned out that the loss
13 didn't turn out to be as bad as we might have thought
14 it was going to be at the moment of injury, you don't
15 make the defendant pay a great deal more than he
16 actually caused. So it seems to me quite reasonable
17 that in the Georgia Pacific area you would look at
18 current data.

19 We are doing something, though, different
20 I think, and I want to press you a little on that. We
21 are trying to set a price that parties in this
22 marketplace, the willing buyer/willing seller, would

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1 have agreed to for a period of time to cover the use
2 of intellectual property. We are trying to set a
3 royalty. And it seems to me that, in general, in the
4 marketplace, prices don't get set at the end of the
5 period by looking back and seeing how things turned
6 out. You and your landlord sit down and you negotiate
7 a price for the lease and you think your business is
8 going to be great, you can afford the lease, and
9 unfortunately, your business doesn't do very well.

10 It's the rare landlord who will come along
11 later and say, "Well, gee, I'm sorry things haven't
12 been so good. We'll cut the lease price in half. Or
13 we'll cut the price for the software royalty in half.
14 Or we'll cut the price for the bandwidth to ten
15 percent, because your business really didn't turn out
16 nearly as good as you thought it would be." Or you
17 buy the stock and the company tanks or whatever.

18 Generally speaking, when we price things,
19 the parties make their best calculation at the time,
20 and that is a price, and if it turns out that things
21 did much better than you thought, great, you've done
22 very well, and if they didn't turn out as well, you

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1 don't generally retrospectively adjust prices because
2 people's expectations weren't achieved.

3 So my question is, is it really -- it
4 seems to me that in the Georgia Pacific area where are
5 you fixing damages, you are, in essence, saying, "All
6 right, we're sitting here in a trial, and we're trying
7 to figure out how much damage you really suffered
8 because of that patent infringement four years ago or
9 six years ago. And at the time it looked like it was
10 going to be devastating but you lucked out, it wasn't
11 nearly as bad, so we'll --" that's a different
12 exercise than saying what would two parties have
13 agreed to prospectively to set a rate. I would have
14 thought in that area you do have to make the judgment
15 pretty much based upon what the parties'
16 understandings and willingness were then, not to come
17 at the end of the period and look back and say, "Boy,
18 I'm glad I didn't agree to that rate. I'd be out of
19 luck."

20 So the question, and it's a long one, is
21 is it really accurate to look at the Georgia Pacific
22 cases on this proposition? Aren't we really doing

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1 something very different than those courts are doing?

2 THE WITNESS: Good, hard question, and I'm
3 going to try to respond to what seemed to be three
4 different but plainly related themes. The first one,
5 maybe the least important for your purposes, is am I
6 being inconsistent in the testimony concerning whether
7 the Georgia Pacific cases are pertinent? And my
8 sense, which I suppose one might regard as just
9 convenient, but actually it happens to be the way I
10 see the field, is that they are relevant, although the
11 eminent domain cases are, for the reasons I tried to
12 indicate, more relevant. And that's the position I've
13 taken in the written testimony and orally and not
14 simply because I hope to capitalize in this particular
15 subset.

16 So maybe a little bit more word on that
17 front. Why are they relevant? Well, because they do,
18 to return to an earlier theme, involve intellectual
19 property, after all, and they do represent a
20 considered effort by a sizable body of federal courts
21 to calculate royalty rates on the basis of willing
22 buyer/willing seller criterion. So, yes, they have

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1 some appropriate place here. And, therefore, it seems
2 appropriate to pay attention to all their
3 manifestations, including this particular one.

4 The second issue, aren't what we're doing
5 -- what you are doing here different? Yes. On the
6 other hand, on one specific issue, which may be
7 relevant to the more general question, not as
8 different as you might have suggested. My impression
9 is that these cases, in fact I think it was Sinclair
10 itself, was willing to take into account subsequent
11 information, not to reduce the rate but to increase
12 it. And so it can't be explained on the basis of the
13 characterization you supplied. Now, that's the second
14 issue.

15 The third is, not surprisingly, highlights
16 the relationship between this theme and the theme you
17 emphasized earlier, which is that I keep on recurring
18 in this written testimony and here, when confronted
19 with difficult interpretive issues as to which there's
20 no good guidance in the legislative history to the
21 underlying purposes.

22 And so specifically, as to this issue, if

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1 holding webcasters to a hypothetical bargain they
2 might have struck, if they were to have struck a
3 bargain in the early segments of the period, had the
4 effect of, as you suggest, driving them out of
5 business, as might have occurred in an unregulated
6 market, that would be, just from their standpoint,
7 unfortunate, but regrettable from the standpoint of
8 the purposes of the statute as a whole, which are to
9 develop this industry rather than to select
10 interpretations that will have the effect of closing
11 it down.

12 But that argument only stands up if you
13 are persuaded on the premise, namely that the Digital
14 Millennium Copyright Act does indeed have as one of
15 its aspirations the continuation of Congress' goal in
16 the Digital Performances and Sound Recordings Act of
17 stimulating, preserving this industry, serving the
18 public's interest in expanded access to music while
19 protecting the record companies against net loss.

20 ARBITRATOR VON KANN: When you speak about
21 driving them out of business, you're not -- it is
22 clear that some of the webcasters are much better --

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1 are in much better financial shape at the moment than
2 others. You are not suggesting, I take it, that any
3 rate which would cause any webcaster to say, "Well, I
4 can't pay for that on top of everything else," is an
5 impermissible rate. It clearly can't be true that we
6 have to set a rate which every single entrant in the
7 field at the moment certifies that they can pay. You
8 don't support that view, I assume?

9 A No, I certainly don't support that view.
10 On the other hand, nor do I support the view that it
11 would be appropriate to pick a rate designed to drive
12 two-thirds of them out of business in order to
13 maximize the revenues of the record companies ten
14 years from now.

15 CHAIRMAN VAN LOON: I'm sorry that I need
16 to ask you to pause for a moment. We have some
17 visitors who in this context are not particularly
18 welcome.

19 (Whereupon, the foregoing matter went off
20 the record at 4:35 p.m. and went back on
21 the record at 4:36 p.m.)

22 ARBITRATOR VON KANN: Yes, that last

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1 answer did prompt me to ask one more, and then I think
2 I am done. And I guess this is almost a metaphysical
3 question in a way, but there's a reference to it in
4 your testimony. Let me see if I can find it here.
5 Yes, on Page 16 of your testimony -- you referred a
6 moment ago to going out of business, and here on Page
7 16 it says, "But a high rate imposed immediately would
8 force many firms out of business in apparent conflict
9 with the statutory goal of stimulating the development
10 and application of new methods of distributing music."

11 And I guess this theme has been sounded a
12 few times, and the reason I say it's almost
13 metaphysical is that there are a number of webcasters
14 who in earlier times when they felt more bullish made
15 commitments at apparently fair market rates to pay
16 millions of dollars for bandwidth and software
17 licenses and office space and employment and built up
18 quite large obligations. Then the advertising market
19 crashed, basically, and these webcasters, many of
20 them, are getting very little revenue and having a
21 very hard time contending with that set of expenses.

22 And then along comes the Panel to set this

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1 rate, and suddenly everybody's pointing at the record
2 companies and saying, "You're about to put us out of
3 business. Not the \$2 million we're paying for
4 bandwidth, not the so many million we're paying for
5 software. You are the one that's going to put" -- and
6 I guess that seems to be carried forward a little bit
7 and seems to me a bit unfair to sort of say to the
8 last guy, "But you don't get a fair market rate,
9 because, unfortunately, times are tough." All these
10 other guys did.

11 And, again, it seems to me, don't we have
12 to sort of put that aside and say our obligation is to
13 set a fair market rate for this particular commodity.
14 If that's the straw that breaks the camel's back, life
15 is tough, but it isn't the record companies that are
16 putting you out of business anymore than it is the
17 bandwidth suppliers or the software company or your
18 landlord. This happens to be the fair market rate
19 that we have to set. Why isn't that the way we have
20 to look at it?

21 THE WITNESS: Given the importance of
22 brevity here, I'll try to be crisp, but it's a hard

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1 question to answer. So I suppose the metaphysical,
2 more abstract response is --

3 ARBITRATOR VON KANN: Who killed the
4 Golden Goose or who put John out of business?

5 THE WITNESS: Well, very complicated
6 answer -- question from an economic standpoint, but
7 one implication of it would seem clear enough, namely
8 that the record companies should not be forced to
9 suffer as a result of bad business decisions made in
10 the past by individual webcasters. So just as
11 important as the statutory purpose of cultivating this
12 industry is the statutory purpose of assuring they
13 don't suffer net injury. So if a rate necessary to
14 allow short-sided webcasters remain in business dipped
15 below the line necessary to compensate the record
16 companies for injuries they sustain, as you say, the
17 appropriate response is, "Tough."

18 Now, having said that, one more level of
19 refinement might be appropriate here. The purpose --
20 this is related to Judge Gulin's question right at the
21 beginning of this proceeding -- the purpose of the
22 statutory criterion informed, among other things, by

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1 the eminent domain case law, is not to deprive the
2 record companies of fair market value for the things
3 that are being taken arguably against their will from
4 them. The purpose is rather to ensure that in this
5 particular context the record companies don't enjoy
6 the power to leverage their market position into what
7 I would characterize as windfall profits.

8 Now in other areas of the Internet field,
9 they can and presumably will. So interactive
10 webcasting, because it has very different economic
11 functions, is an entirely different category,
12 unconstrained by this entire apparatus. So in other
13 areas, Congress has made the judgement, a sensible
14 judgment, given the differences in the technology, to
15 let the market, including its exercise of monopoly
16 power, operate unconstrained. But in this particular
17 context, it hasn't.

18 The purpose, thereby, is not, however, to
19 return to the original analogy of the landowner in the
20 valley, to give him nothing. The purpose is rather to
21 say, "Yes, you get the fair market value of your land,
22 but you don't get to extract from the government a

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1 premium related to the fact that the government has no
2 place else to go."

3 ARBITRATOR VON KANN: You said a moment
4 ago if they make poor decisions. I'm not even sure we
5 have to conclude they were poor decisions. They may
6 have been entirely reasonable assessments, which
7 history has proven wrong. They may have decided this
8 stock was a very good buy at so much, and,
9 unfortunately, it turned out not to be, even though
10 you did all your due diligence. I mean I think there
11 were understandings about what the advertising market
12 would yield, and they have not, at least recently,
13 proven out.

14 I'm not necessarily -- I don't think
15 necessarily it means they failed to do a good due
16 diligence; the world changed for various reasons, so
17 we've heard. But it does seem to me Mr. Garrett's
18 question to you about don't we have to take into
19 account, to some extent, the economic conditions and
20 the assessments and the assumptions that the parties
21 were operating on, at least during the first period,
22 which, to a large extent, have unfortunately not

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1 materialized.

2 It seems to me very hard to see how we can
3 ignore that that was sort of the assumptions that
4 people were making about this business, and that would
5 have influenced the kinds of prices that people would
6 have been prepared to sign on for, I would have
7 thought.

8 THE WITNESS: To which, as I recall, I
9 think my answer was, yes.

10 ARBITRATOR VON KANN: Okay. All right.
11 Thank you.

12 MR. RICH: Mr. Chairman, one more brief
13 follow-up to Judge von Kann's question.

14 REDIRECT EXAMINATION

15 BY MR. RICH:

16 Q When you testified, Professor Fisher,
17 about the statutory goal of stimulating the
18 development and application of new methods of
19 distributing music on the Internet, have you found any
20 similar analog with respect to the other kinds of
21 inputs mentioned by Judge von Kann, you know,
22 bandwidth or software, are you familiar with any

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1 comparable statutory license procedure or statutory
2 imperative with respect to the pricing of those kinds
3 of goods, services or license agreements?

4 A No.

5 MR. RICH: I have no further questions.

6 ARBITRATOR VON KANN: But those are things
7 that are apparently priced, as much as we know, on the
8 marketplace in arm's length negotiations between
9 willing buyers and willing sellers, I guess. True?

10 THE WITNESS: True. And it's one of the
11 reasons why this is a special field is because this is
12 an area where there is a very substantial
13 concentration of market power in a single actor.

14 CHAIRMAN VAN LOON: Thank you, once again,
15 for being with us today.

16 ARBITRATOR VON KANN: Mr. Garrett has --

17 CHAIRMAN VAN LOON: Oh, Mr. Garrett, I'm
18 sorry.

19 MR. GARRETT: I have one follow-up to
20 Judge von Kann's questions --

21 CHAIRMAN VAN LOON: Please.

22 MR. GARRETT: -- on the difference in the

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1 statutory standard, but it will not entail asking any
2 questions. I simply want to hand out a document that
3 we filed -- a set of documents that we filed at the
4 beginning of this proceeding with the Copyright
5 Office. It was actually directed against -- with
6 respect to Professor Jaffe's --

7 CHAIRMAN VAN LOON: Jaffe's or Fisher?

8 MR. GARRETT: Fisher, Fisher's, excuse me,
9 I'm sorry, Professor Fisher's testimony. And it
10 ultimately resulted in a ruling from the Copyright
11 Office that it has -- this a complete set of both the
12 our filings and the other side's filings on the
13 Copyright Office order talking about the differences
14 in the statutory standards.

15 MR. STEINTHAL: Wasn't this part of the
16 record previously?

17 MR. GARRETT: I don't believe we've handed
18 this out before. It is part of the record. It was
19 part of the record that was developed for the
20 Copyright Office, but I don't believe we've --

21 ARBITRATOR VON KANN: We've got it. I
22 think we've seen this at some point.

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1 CHAIRMAN VAN LOON: In that event, we once
2 again thank you for making the trip. We wish you a
3 safe journey back with thanks for the information
4 you've brought us.

5 ARBITRATOR GULIN: Mr. Garrett, did you
6 intend to offer this one --

7 MR. GARRETT: Oh, yes. I ask the Panel to
8 take official notice. Actually, it's cited in
9 Professor Fisher's testimony too.

10 ARBITRATOR VON KANN: The Australian --

11 CHAIRMAN VAN LOON: Just that article? No
12 objections?

13 MR. GARRETT: The Australian decision?

14 CHAIRMAN VAN LOON: Yes. Admitted as RIAA
15 Exhibit Number 113 RPX.

16 (Whereupon, the document, RIAA
17 Exhibit No. 113 RPX, was
18 admitted into evidence.)

19 CHAIRMAN VAN LOON: Let's reconvene then
20 at five past five.

21 (Whereupon, the foregoing matter went off
22 the record at 4:46 p.m.)

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CERTIFICATE

This is to certify that the foregoing transcript in
the matter of: Hearing: Digital Performance Right
 in Sound Recording and Ephemeral
 Recording,
 Docket No. 2000-9 CARP DTRA 1 & 2

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: October 17, 2001

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.


